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140-445

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~641~~. 338

THE BANK OF LEWISBURG, APPELLANT,

vs.

HUGH W. SHEFFEY AND JAMES BUMGARDNER, JR., TRUSTEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED FEBRUARY 29, 1888.

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1 Pleas held before the Hon. John J. Jackson, judge of the district court of the United States for the district of West Virginia, at Charleston, in said district, on Wednesday, the 30th day of November, A. D. 1887, and of the Independence of the United States of America the 112th.

Be it remembered that heretofore, to wit, at a district court of the United — for the district of West Virginia holden at Charleston on Thursday, the 3rd day of May, 1877, among the proceedings held was the following:

SHEFFEY and BUMGARDNER
vs.
BANK OF LEWISBURG and Others. } In Chancery.

This day Hugh W. Sheffey and James Bumgardner, Jr., presented their bill, with the affidavit of said Bumgardner attached thereto, praying that an injunction be awarded them inhibiting, restraining, and enjoining the defendants, Alexander F. Matthews and the Bank of Lewisburg, from selling or otherwise proceeding under a deed of trust executed by Robert J. Glendy to Alexander F. Matthews to secure the Bank of Lewisburg, dated 11th day of October, 1875, until the further order of this court.

The court, upon examination of the bill and exhibits, doth
2 award the injunction as prayed for, but said injunction is not to take effect until the complainants or one of them shall execute a bond with security, to be approved by the clerk of this court, in the penalty of $500.00, conditioned to pay all such costs and damages as the defendants may show themselves entitled to in the event that said injunction is dissolved.

The bill and exhibits referred to in the foregoing order are in the following words and figures, to wit:

The bill of complaint of Hugh W. Sheffey and James Bumgardner, Jr., trustees, &c., citizens and inhabitants of the State of Virginia, complainants, against Alexander F. Matthews, The Bank of Lewisburg, the said Bank of Lewisburg being a corporation duly created and organized under and by the laws of the State of West Virginia, and its principal office being in West Virginia and doing its business in West Virginia, and Robert J. Glendy, citizens and inhabitants of the State of West Virginia, defendants.

To the Hon. John J. Jackson, Jr., judge of the United States district court for the judicial district of West Virginia, sitting at Charleston:

Humbly complaining to your honor, the complainants respectfully represent that they are citizens and inhabitants of the State of Virginia, and that on the 20th day of November, 1876, one Robert J. Glendy and wife executed a deed of trust to them as trustees to secure all the creditors of the grantor. The names of the creditors

secured and the amount of the indebtedness in [are] not set
3 out and described in said deed, but means are provided therein for ascertaining the same. The property conveyed in said deed is situated partly in the State of West Virginia and partly in the State of Virginia.

Among the lands situate in West Virginia is a tract of land situate in Greenbrier county and known as the Stuart M'Clung farm, containing some 1,200 or 1,400 acres of very valuable land.

An office copy of said deed is herewith filed and marked Exhibit No. 1.

Your orators allege that said deed was duly recorded in the clerk's office of the county court of Greenbrier county, West Virginia, on the 21st day of November, 1876, at 20 minutes to 11 o'clock antemeridian of that day.

Your orators allege that said deed was acknowledged and recorded according to law.

The complainants also allege that the larger portion of the creditors secured in said deed are residents of the States of Virginia and Pennsylvania.

On the 21st day of November, 1876, at 20 minutes to 4 o'clock, past meridian, the defendant, The Bank of Lewisburg, with the full notice of the recordation of the deed of trust (Exhibit No. 1) and by reason of and in consequence of the recordation of the trust aforesaid, lodged in the clerk's office of the county court of Greenbrier county a paper writing, purporting to be a deed of trust from the defendant Glendy to the defendant Alexander F. Mathews, to secure
to the said bank the sum of $15,000.00. An office copy of
4 said paper is here filed and marked Exhibit No. 2.

Your orators allege that they had no knowledge of the existence or contents of said last-mentioned deed, Exhibit No. 2, until long after the same was spread upon the record book of said county; and they further allege that said deed of trust, if ever properly recorded, was recorded after the deed of your orator, and that according to the laws of West Virginia said deed of trust No. 2 merely conveys to the said Alex. F. Mathews the equity of redemption in the land described in said deed, subject to the legal estate vested in the complainants by the trust deed No. 1, and the Bank of Lewisburg only has a lien subject to the liens of the *cestui que trust* of your orators upon the property conveyed in trust deed, Exhibit No. 2.

Your orators also allege that said paper writing is void as a trust deed in West Virginia for the reason that said deed was not acknowledged in the manner required by law.

The acknowledgment is invalid for the following reasons: It does not follow in form or substance the provisions of the law of West Virginia.

First. It does not appear from the certificate for what county the notary was an officer.

Second. It does not appear in what county the acknowledgement was taken.

Third. It does not appear that the acknowledgement was taken in the county for which the notary was commissioned to act.

Fourth. It does not appear that the acknowledgment was
5 taken within the limits of the State of Maryland.

Notwithstanding the premises, the trustee, A. F. Mathews, has advertised the Stuart M'Clung farm for sale under and by virtue of the trust deed No. 2, and the sale is fixed for the 9th day of May, 1877, as will fully appear by a printed copy of the advertisement of sale, here filed as part of the bill, marked Exhibit No. 3.

Your orators allege that the trustee Mathews has not, as they charge, although upon that subject they do not speak from their personal knowledge, advertised said sale according to law, in this, that the trustee has not posted a copy of the advertisement upon the property advertised for sale, nor at three other public places in the county of Greenbrier, and that he has not served a copy of the same upon the grantor.

The notice of sale is also invalid in this: It does not describe the debt due nor does it mention who is the trustee or the *cestui que trust.*

Forasmuch as your orators are without remedy save in this court, they pray that the defendants named as such in the caption be made defendants to the bill, and that the Bank of Lewisburg and Alexander F. Mathews be inhibited, restrained, and enjoined from selling under or otherwise proceeding under the deed exhibited — No. 2.

And that your orators have such other further and general relief as equity and good conscience may require and the exigencies of their cause demand.

HUGH W. SHEFFEY.
JAMES BUMGARDNER, Jr.

QUARRIER, *Sol.*

6 STATE OF WEST VIRGINIA, *County of Kanawha,* } *To wit:*

I, Peter Fontaine, a notary public in and for the said county, in the State aforesaid, do hereby certify that James Bumgardner, Jr., one of the complainants in the foregoing bill, having been by me first duly sworn, upon his oath says that the allegation and statements therein made are true, so far as they are made upon his own knowledge, and that so far as they are made upon information that he believes them to be true.

JAMES BUMGARDNER, Jr.

Subscribed and sworn to before me, in my county aforesaid, this 3rd day of May, 1877.

PETER FONTAINE,
Notary Public in and for Kanawha County, West Virginia.

7 This deed, made this 20th day of November, 1876, between Robert J. Glendy and Mary Jane, his wife, of the county of Bath, in the State of Virginia, of the first part, and Hugh W. Sheffey and James Bumgardner, Jr., of the county of Augusta and State of Virginia, of the second part, witnesseth: That whereas the said Robert

J. Glendy owes many and large debts, which he desires to secure and, at the same time, prevent any of his creditors from getting priorities over others, and to place said creditors on a footing of entire equality; and whereas the said Mary Jane Glendy is entitled to dower in the lands hereinafter conveyed, but is willing and hath agreed to convey and relinquish the same in consideration of a conveyance executed by said Robert J. Glendy, of even date with this deed and as a part of the same transaction, to Hugh W. Sheffey, as trustee for said Mary Jane Glendy, and such persons as she shall appoint by deed or will and otherwise as in said conveyance is provided, of other property which she has agreed to accept as and for a satisfaction of and compensation for her said dower right:

Now, therefore, in furtherance of the object above stated and in consideration of the premises and for one dollar paid to said Robert J. Glendy by said Hugh W. Sheffey and James Bumgardner, Jr., the receipt whereof is hereby acknowledged, the said Robert J. Glendy and Mary Jane, his wife, do grant, bargain, and sell unto the said Hugh W. Sheffey and James Bumgardner, Jr., and their heirs, as trustees, all the following real and personal property, viz:

8 First. A certain tract or parcel of land in the county of Greenbrier, in the State of West Virginia, adjoining the lands of Bollar M'Clung and others, containing about twelve hundred acres, more or less, and known as the Stuart M'Clung farm or tract.

Second. All the lands of the said Robert J. Glendy in the county of Highland, in the State of Virginia, consisting of the branch farm purchased of the estate of Felix H. Hull, dec'd, and containing about 800 acres, more or less, and an adjoining parcel of about 400 acres, more or less, bought of Samuel Moyers and Pullins, and three parcels purchased of A. J. Jones's trustee, to wit, the Home place, the Harmon place on Bull Pasture Mountain, and about 1,500 acres about the head-waters of Shaw's fork, in said county of Highland.

Third. The Clover-Dale estate, in the county of Bath, in said State of Virginia, containing about 2,900 acres, more or less, bought of John W. Fraziers's estate.

Fourth. The Guin place, in the county of Augusta, containing about 400 acres, more or less, and adjoining the lands of Mary Jane Craig and Lewis Kincaid's heirs.

Fifth. Two parcels of land in the county of Augusta, in said State of Virginia, near the city of Staunton, conveyed to said Robert J. Glendy by Hugh W. Sheffey and wife by deed bearing date on the — day of October, 1876, and recorded in the clerk's office of said last-named county.

Sixth. All the interest and estate of the said Robert J. Glendy in a certain lot or parcel of ground in the city of Staunton known as the Moncure or Foundry lot.

9 Seventh. A lien charge of $3,000.00 retained on the Wilderness property conveyed by said Robert J. Glendy to said Hugh W. Sheffey, trustee for said Mary Jane Glendy as aforesaid.

Eighth. All the personal property of the said Robert J. Glendy

on any of the lands hereby conveyed, and consisting of the following, in Greenbrier county, on the M'Clung farm, to wit: Household and kitchen furniture, farming implements of various kinds, including one mower, 8 or 10 horses and colt, 12 or 15 cows, same number of calves and same number of yearlings, and all other personal property on said M'Clung farm; and also 5 or 6 cows, about 10 yearlings, and 10 calves, on the Branch farm in Highland county.

Ninth. Also a parcel of about 100 acres of land in Greenbrier county, West Virginia, part of the M'Clung purchase, but detached from the main tract and lying on Hughart's creek—

Upon trust and with the hope that business prosperity may be restored during the ensuing year and the property may sell for enough to pay all of said Glendy's just debts; that such time during the summer of 1877 as said Hugh W. Sheffey and James Bumgardner, Jr., trustees, shall deem most conducive to the interest of said creditors, they shall make sales of said real and personal property on credits as follows, to wit: The personal property at six months, and the real estate at one, two, and three years from the day of sale, and bearing interest from that day; negotiable notes well endorsed or bonds well secured, as said trustees shall deem most advisable, to be taken from the purchaser; enough, however, in cash, to be
10 collected on the day of sale to pay the costs of drawing and recording this deed and of said sales.

And upon the further trust that the sale notes or bonds shall be made payable at the Augusta National Bank of Staunton and registered and deposited in said bank for safe-keeping and collection, and an account of such collections and of all disbursements thereof shall be kept at said bank, which shall at all times be open to the inspection of any of the creditors of said Robert J. Glendy.

And upon the further trust that in order to ascertain the debts due to the creditors, respectively, said trustees may convene them, by publication, before a master commissioner, who shall state and determine in each case how much is justly due, and from time to time shall state accounts of the funds collected and ascertain the dividends to which the creditors shall be entitled, and which shall be promptly paid out by the checks of said trustees on the fund in said bank.

And upon the further trust that after discharging the amounts due from said Robert J. Glendy on judgments against him and on vendors and other paramount liens now binding said lands hereby conveyed the trust fund shall be distributed ratably among the creditors of said Robert J. Glendy who may come forward and prove their debts before said master commissioner within 90 days after publication of notice requiring them so to do; the amounts provable in cases in which said Glendy is bound as surety or endorser to be those for which he is equitably liable, it being understood that the title to the Given place aforesaid is vested in John W.
11 Glendy, subject to a charge in his favor of the sum of one thousand dollars, with interest from the 1st day of November, 1875, upon payment of which said John W. Glendy is to release and

convey said title to said trustees, as is evidenced by his execution of this writing.

Said trustees are to receive as their compensation five per cent. on the amount of sales. Should a favorable opportunity offer for an advantageous sale of any of said property before the time hereinbefore indicated the said trustees may sell the same privately. It is further understood that the notes and bonds taken by said trustees for property sold in West Virginia may be made payable elsewhere than at the Augusta National Bank, but all moneys, notes, and bonds arising out of such sales shall be deposited or the proceeds thereof deposited in said bank and disbursed by checks thereon, so that the trustee's account in said bank shall exhibit a true cash account of the trust fund; and it is further understood that said trustees may change the terms of sale if they deem it best for the interests of the creditors.

In all other respects not hereinbefore provided otherwise this deed shall be enforced according to the provisions of the code of Virginia.

Witness the following signatures and seals:

ROBERT J. GLENDY. [SEAL.]
MARY JANE GLENDY. [SEAL.]
HUGH W. SHEFFEY. [SEAL.]
JAMES BUMGARDNER, JR. [SEAL.]
JOHN. W. GLENDY. [SEAL.]

12 STATE OF VIRGINIA, *Augusta County,* } *To wit:*

I, Louis M. Bumgardner, a notary public for the county aforesaid, in the State of Virginia, do certify that Robert J. Glendy, Hugh W. Sheffey, James Bumgardner, Jr., and John W. Glendy, whose names are signed to the writing hereto annexed, bearing date on the 20th day of November, 1876, have acknowledged the same before me in my county aforesaid.

Given under my hand this 20th day of November, 1876.

LOUIS M. BUMGARDNER,
Notary Public.

STATE OF VIRGINIA, *Augusta County,* } *To wit:*

I, Lewis M. Bumgardner, a notary public for the county aforesaid, in the State of Virginia, do certify that Mary Jane Glendy, the wife of Robert J. Glendy, whose names are signed to the writing hereto annexed, bearing date on the 20th day of November, 1876, personally appeared before me, in the county aforesaid, and, being examined by me privily and apart from her husband and having the writing aforesaid fully explained to her, she, the said Mary Jane Glendy, acknowledged the said writing to be her act and declared that she had willingly executed the same and does not wish to retract it.

Given under my hand this 20th day of November, anno Domini 1876.

LEWIS M. BUMGARDNER,
Notary Public.

13 IN THE CLERK'S OFFICE OF THE COUNTY COURT OF GREENBRIER COUNTY,
November 21, 1876.

This deed, between Robert J. Glendy and wife and Hugh W. Sheffey and James Bumgardner, Jr., trustees, was this day presented in the office aforesaid, and having been duly acknowledged by the grantors thereto before Lewis M. Bumgardner, a notary public of Augusta county, Virginia, is admitted to record at 20 minutes to 11 o'clock a. m.

Teste: MARK L. SPOTTS, *Clerk.*

A copy.

Teste: MARK L. SPOTTS, *Clerk.*

This deed, made and entered into this 11th day of October, 1875, between Robert J. Glendy, of the one part, and Alex. F. Mathews, trustee as hereinafter mentioned, of the other part, witnesseth: That the said Robert J. Glendy doth grant unto the said Alexander F. Mathews the following property, viz:

First. The lands situated in Greenbrier county, upon the waters of Sinking creek, known generally as the Stuart McClung property, formerly owned by And'w McClung, dec'd, one, and the largest, portion of which was purchased by said Glendy under a decree of the circuit court of said county in the suit of Albert McClung's Administrator *vs.* Stuart McClung & *als.*, another portion of which was purchased by the said Glendy under a decree of said court in the suit of Dennis, guardian, &c., *vs.* Taylor & *als.;* a third portion was bought by said Glendy under a decree of said court in the
14 suit of George Seawright *vs.* Crawford & *als.*, and the fourth and last portion of which was purchased by said Glendy from and conveyed to him by Patrick Beirne and A. M. Beirne and wife.

Second. A tract or parcel of land containing 200 acres, more or less, situated in said county, near the town of Frankfort, sold and conveyed to said Glendy by Samuel C. Ludington.

In trust to secure to the Bank of Lewisburg certain debts which the said Glendy now owes to said bank, evidenced by two negotiable notes, one for $10,000.00, due October 11–14th, '75, and the other for $5,000.00, due October 22–25th, '75, and in trust further to secure to said Bank of Lewisburg any and all other debts which the said Glendy may at any time hereafter owe to said bank, either by the renewal of the said negotiable notes or by original loans made to him by the said Bank of Lewisburg, with this express provision and stipulation, however, that the said indebtedness shall not at any one time exceed the sum of fifteen thousand dollars ($15,000.00).

Witness the following signature and seal:

ROBERT J. GLENDY. [SEAL.]

Witness:

SAMUEL J. MORGAN.

UNITED STATES OF AMERICA, } *To wit:*
State of Maryland, }

Be it known that on this 16th day of November, one thousand eight hundred and seventy-five, before me, the subscriber, a notary public, by letters patent under the great seal of the State of Maryland, commissioned and duly qualified, residing in the city
15 of Baltimore, in the State aforesaid, personally appeared Robert J. Glendy, of Bath county, State of Virginia, personally known to me as such, party to the annexed instrument of writing, and acknowledged the same to be his act and deed.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed my notarial seal the day and year aforesaid.

TH. HARRIS HODGES,
Notary Public.

GREENBRIER COUNTY COURT CLERK'S OFFICE,
November 21, 1876.

This deed was this day presented in this office at 20 minutes to 4 o'clock p. m. and, with the certificate thereto attached, admitted to record.

Teste: MARK L. SPOTTS, *Clk.*

A copy.

Teste: MARK L. SPOTTS, *Clk.*

Fee, 75c.

16 In the District Court of the United States for the District of West Virginia, Sitting at Charleston, *ss:*

The Demurrer and Answer of The Bank of Lewisburg to a Bill Filed in said Court Against it and Others by Hugh W. Sheffey and James Bumgardner, Jr.

Demurrer.

This respondent says that plaintiffs' bill is insufficient in law. It therefore demurs to the same and assigns the following grounds of demurrer:

First. It is not alleged in said bill that the lands conveyed in trust deed filed therewith as Exhibit No. 2 are the same or any part of the lands conveyed to the pl'fs in trust deed filed as Exhibit No. 1, nor is it otherwise shown that the lands advertised for sale by the defendant, A. F. Mathews, trustee, are any part of the lands conveyed to the pl'ffs.

Second. The said bill does not aver that Robert J. Glendy owed any debts at the time he executed the said trust deed, Exhibit No. 1, or that he was indebted to any one at the time said bill was filed.

Third. All the grantors in said deed, Exhibit No. 1, and necessary parties and the *cestui que trusts* secured by it, if any such there be, should be made parties. The said bill is therefore defective for want of necessary and proper parties; and

Fourth. The said bill is otherwise defective and insufficient in law.

17 *Answer.*

This respondent, without in any manner waiving its demurrer aforesaid, but insisting that the same is well taken, for answer to said bill says—

That prior to and on the 11th day of October, 1875, the d'f't, Robert J. Glendy, was indebted to respondent in the sum of $15,000.00 for money loaned to him, and for which respondent held his two negotiable notes, the one for $10,000.00, due October 11–14, 1875, endorsed by S. A. Clark, and the other for $5,000.00, due October 22–25, 1875, endorsed by D. V. Ruckman and James Knight; and the said Glendy desiring an extension of said loan and resp'd't being unwilling to continue the same upon the security it then held, the said Glendy, on the said 11th day of October, 1875, agreed to execute the deed which was on that day drawn, but which was not acknowledged and delivered by said Glendy until the 17th day of November, 1875, a copy of which is filed with the plaintiffs' bill as Exhibit No. 2.

That at the request of said Glendy said deed was not then placed upon record, but was retained in the possession of the respondent with the agreement and understanding between respondent and said Glendy that it should be held as security for the payment of $15,000.00, and that it should from the time of its delivery, as aforesaid, operate as a lien upon the lands conveyed by it with full authority to respondent to have it recorded whenever it saw proper to do so.

That with this understanding and agreement respondent continued said loan and from time to time renewed the notes
18 of said Glendy for said loan; that on the 21st day of November, 1876, the d'f't Glendy was still indebted to respondent in the said sum of $15,000.00, for which it held his two negotiable notes, endorsed by D. V. Ruckman, the one for $10,000.00, dated September 30th, 1876, and due at four months, and the other for $5,000.00, dated November 6th, 1876, and due at four months after date; that on said 21st day of November, 1876, respondent caused said trust deed to be duly recorded in the clerk's office of the county court of Greenbrier county; that subsequently, when said Glendy's notes last mentioned, respectively, became due, each was presented for payment according to the tenor and effect thereof, and payment being refused they were each duly protested for non-payment and notice thereof given to said Glendy and his endorser, D. V. Ruckman.

The said trust deed and the said two negotiable notes last aforesaid, with the certificates of protest, are here exhibited as parts of this answer, marked Exhibits "A," "B," & "C," respectively.

That no part of said $15,000.00 has been paid, but the whole thereof, with $——, the charges of protest, and interest thereon since the maturity of said notes, is now due to respondent, and the same, by virtue of the said trust deed, operates as a primary lien upon the lands in said deed conveyed.

Respondent denies that the defendant, Robert J. Glendy, is a citizen or an inhabitant of the State of West Virginia, but it
19 avers that, on the contrary, *that* he is a citizen and an inhabitant of the State of Virginia, and that this fact was well known to the plaintiffs at the time they exhibited their bill in this court.

That the deed executed to the plaintiffs, a copy of which is exhibited with their bill, was delivered to the clerk of the county court, as respondent is informed, for record on the same day and a few hours before the said deed of respondent was recorded by said clerk, but respondent denies that said deed of plaintiffs has priority over the lien created by the said deed of respondent as to the lands conveyed in the latter, because—

First. At the time said deed was executed to plaintiffs they had actual notice of the existence of said deed of respondent, and certainly before said deed to plaintiff was recorded in said Greenbrier county they had such notice.

Second. The said deed recognizes and excepts from its operation the lien of respondent's deed, and it in terms directs the plaintiff, in distributing the proceeds arising from the property conveyed to them, to discharge, first, "the amounts due from said Robert J. Glendy on judgments against him and on vendors' and other paramount liens now binding said lands hereby conveyed."

The deed of respondent was then a valid lien on the lands about to be conveyed by Glendy to plaintiffs, and, per consequence, was paramount to any deed not then executed by him as to said Glendy, and by recognizing this paramount lien and providing for its priority by the terms of the deed subsequently exe-
20 cuted to the plaintiffs this priority was preserved and made operative as a notice to and against the plaintiffs and all who claim under them.

Third. That respondent's deed was duly recorded before the *cestui que trusts* in the deed executed to the plaintiffs had by its terms accepted its provisions, and in fact before they had notice of the existence of the latter deed; and

Fourth. The plaintiff's deed was never in fact duly recorded in Greenbrier county. The certificate of the clerk of said county is not in substance or in form such as the laws of West Virginia require to make it operate as a recorded deed.

It neither certifies that the deed was acknowledged before the said clerk in his office nor that it was admitted to record upon the certificate of any other officer.

This deed, not having been admitted to record according to law, cannot operate as constructive notice against the deed of respondent.

Respondent denies that the deed to the plaintiffs has any validity as against the creditors of Robert J. Glendy, the grantor therein; that as to respondent it is by its terms inoperative and void upon the following grounds:

First. The purpose of said deed as declared on its face is to hinder, delay, and defraud the creditors of the grantor from enforcing and collecting their debts by the ordinary process of law. Its language

is "to prevent any of his (the grantor's) creditors from getting priorities over other, &c., and with the hope that business prosperity may be restored during the ensuing year and the property may sell for enough to pay all of said Glendy's debts." This shows
21 an avowed and unmistakable purpose to delay, hinder, and prevent the creditors of the grantor from subjecting said property by any legal process to the payment of their debts.

Second. It excepts from its operation property of the grantor in favor of his wife, the extent and value of which is not indicated or limited; it reserves to the grantor the absolute possession and the irresponsible use and control of all the property, both real and personal, conveyed by it until such time as the trustees therein appointed may, in their discretion, under the terms thereof, sell the said property or such as may escape consumption and eloisement by the grantor, and at the same time it requires all creditors of the grantor to file their claims within ninety days after publication of notice to them by said trustees before a commissioner, or be excluded from any participation in the distribution of the proceeds of the said property, thus compelling all creditors to leave the possession, use, and control of the property in the hands of the irresponsible and insolvent grantor without any security, and to release to the wife of said grantor property the amount and value of which is not limited or made known to said creditors.

The law requires an insolvent debtor, when he undertakes to force his own terms upon his creditors, to make a full and absolute surrender of all his estates.

This has not been done in this deed, and, aside from the exceptions and benefits reserved to the grantor and his wife, it does
22 not appear that it conveys all the property of the grantor. It assigns no credits or choses in action of any kind, although Glendy had at the time debts due him to the amount of several thousand dollars.

Third. There are no credits or *cestuis que trust* named in the deed. So far as the pleadings in this cause show, the debt of the respondent is the only debt due from said Glendy.

Fourth. That said Glendy was at the time said deed was executed entirely insolvent, and the same was executed in fraud of the bankrupt law and with the intent to defeat the operation of the insolvent statutes of the United States, of which fact and intent the plaintiffs had full notice before and at the time said deed was executed; and

Fifth. It directs the trustees to take the proceeds of the property in this State to a foreign State and jurisdiction, and compels the creditors of the grantor to file their debts before a commissioner of said foreign jurisdiction and then follow them to collect their money from foreign trustees.

Respondent does not deem it necessary to notice the criticism made in the plaintiffs' bill as to the validity of the recordation of respondent's trust deed and as to the legality of the advertisement for a sale under said deed, further than to deny that any part of said criticism is just or sustained by either law or the facts in this case; but even

if it were true that the deed of respondent had never been duly recorded, still it would be valid against the plaintiffs as an
23 unrecorded deed if the grounds relied on by respondent, as hereinbefore set forth, are sustained.

All the allegations of the plaintiffs' bill inconsistent with this answer are denied.

Having answered fully, this respondent prays that the plaintiffs' injunction may be dissolved, their bill dismissed, and that it may recover its costs.

STATE OF WEST VA., *County of Greenbrier,* } ss:

Alex. F. Mathews, being duly sworn, says that he is one of the directors of the Bank of Lewisburg; that all the facts and allegations in the above answer contained which are stated upon the knowledge of the said bank he knows to be true, and that so far as they are stated upon information he believes them to be trne.

ALEX. F. MATHEWS.

Taken, subscribed, and sworn to before me this 21st day of July, 1877.

J. ALEX. MONTGOMERY,
Notary Public.

24 The compl't excepts to the filings of this answer and asks that it be stricken from the cause—

1st. Because it is not authenticated as provided by law.

2nd. Because it is not responsive to the allegations of the bill relative to the notice of sale.

22 August, 1887.

QUARRIER,
Sol. for Compl't.

Filed by d'f'ts July 23rd, 1887.
Teste: JASPER Y. MOORE, *Clerk.*

This deed, made and entered into this the 11th day of October, 1875, between Robert J. Glendy, of the one part, and Alex. F. Mathews, trustee, as hereinafter mentioned, of the other part, witnesseth: That the said Robert J. Glendy doth grant unto the said Alex. F. Mathews the following property, viz:

25 First. The lands situated in Greenbrier county, upon the waters of Sinking creek, known generally as the Stuart M'Clung property, formerly owned by Andrew M'Clung, dec'd, one and the larger portion of which was purchased by said Glendy under a decree of the circuit court of said county in the suit of Albert M'Clung's Adm'r *vs.* Stuart M'Clung & *als.*; another portion of which was purchased by the said Glendy under a decree of said court in the suit of Dennis, guardian, &c., *vs.* Taylor and others, a third portion of which was bought by said Glendy under a decree of said court in the suit of George Seawright *vs.* Crawford & *als.*; and the

fourth and last portion of which was purchased by said Glendy from and conveyed to him by Patrick Beirne and A. M. Beirne and wife.

Second. A tract or parcel of land, containing two hundred acres, more or less, situated in said county, near the town of Frankfort, sold and conveyed to the said Glendy by Sam'l C. Ludington in trust to secure to the Bank of Lewisburg certain debts which the said Glendy now owes to said bank, evidenced by two negotiable notes—one for $10,000.00, due October 11–14th, '75, and the other for $5,000.00, due October 22–25th, '75—and in trust further to secure to said Bank of Lewisburg any and all other debts which the said Glendy may at any time hereafter owe to said bank, either by the renewal of said negotiable notes or by original loans made to him by the said Bank of Lewisburg, with this express provis-
26 ion and stipulation, however, that the said indebtedness shall not at any one time exceed the sum of fifteen thousand dollars ($15,000.00).

Witness the following signature and seal:

ROB'T J. GLENDY. [SEAL.]

Witness:
SAMUEL T. MORGAN.
Witness:
ALEX. F. MATHEWS.

UNITED STATES OF AMERICA, *State of Maryland*, } *To wit:*

Be it known that on this sixteenth day of November, one thousand eight hundred and seventy-five, before me, the subscriber, a notary public by letters patent under the great seal of the State of Maryland, commissioned and duly qualified, residing in the city of Baltimore, in the State aforesaid, personally appeared Robert J. Glendy, of Bath county, State of Virginia, personally known to me as such party to the annexed instrument of writing, and acknowledged the same to be his act and deed.

[SEAL.] In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year aforesaid.

TH. HARRIS HODGES,
Notary Public.

GREENBRIER COUNTY COURT,
CLERK'S OFFICE, *November 21st*, 1876.

This trust deed was this day presented in this office at 20
27 minutes to four o'clock p. m., and, with the certificate thereto attached, admitted to record.

Teste: MARK L. SPOTTS, *Clerk.*

GREENBRIER COUNTY COURT,
CLERK'S OFFICE, *March 27th*, 1878.

This trust deed from Robert J. Glendy to Alex. F. Mathews,

trustee, dated the 11th day of October, 1875, embracing real estate in Greenbrier county to secure certain debts due to the Bank of Lewisburg, was on this day presented in this office and proven as to its execution and delivery by the oath of Alexander F. Mathews, subscribing witness thereto, and the handwriting and acknowledgement thereof being also proven by the oath of J. W. Mathews, the said trust deed, with all the certificates thereon endorsed, is readmitted to record at 15 minutes to 5 o'clock p. m., at the instance of A. F. Mathews, trustee.

Teste: MARK L. SPOTTS, *Clerk.*

$10,000.00. LEWISBURG, W. VA., *Sept.* 30, 1876.

Four months after date I promise to pay to order of D. V. Ruckman ten thousand $\frac{00}{100}$ dollars, negotiable and payable without offset at the Farmers' and Merchants' Nat. Bank of Baltimore, Md., value received.

3468, 31 | 3 Feb., '77.

ROBERT J. GLENDY.

Endorsers:
D. V. RUCKMAN.
J. W. MATHEWS, *Cash'r.*

28 UNITED STATES OF AMERICA, *State of Maryland,* } *To wit:*

On this day, the 3rd of February, in the year of our Lord eighteen hundred and seventy-seven, at the request of the Farmers' and Merchants' Nat. Bank of Baltimore, bearer of the original promissory note whereof a true copy is above written, I, Th. Harris Hodges, notary public, by letters patent under the great seal of the State of Maryland, commissioned and duly qualified, residing in the city of Baltimore, in the State aforesaid, presented the said promissory note at the Farmers' and Merchants' Nat. Bank of Baltimore, where it is made payable, and demanded payment of the same, — was answered, "No funds."

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, as well against the maker and endorsers of the said promissory note as all others whom it may concern, for exchange, re-exchange, and all costs, charges, damages, and interests suffered and to be suffered for want of payment of the said promissory note.

Thus done and protested, at the city of Baltimore aforesaid, and on the same day I addressed written notices to the endorsers of said promissory note informing them that it had not been paid, payment thereof having been demanded and refused, and that they would be held responsible for the payment thereof, and mailed notices under cover for the maker and endorsers, directed to J. W. Mathews, Esqr., cash. Bank of Lewisburg, Lewisburg, W. Va., all same day.

29 In testimony whereof I have hereunto set my [SEAL.] hand and affixed my seal notarial the day and year aforesaid.

(Signed) THO. HARRIS HODGES,
Notary Public.

Protest	$2 00
Postage	03
	2 03

$5,000.00. LEWISBURG, W. VA., *Nov. 6th*, 1876.

Four months after date I promise to pay to the order of D. V. Ruckman five thousand $\frac{00}{100}$ dollars, negotiable and payable, without offset, at Farmers' and Merchants' Nat. Bank of Baltimore, Md., value received.

ROBERT J. GLENSY.

3568, 6 | 9 March, '77.

Endorsers:
D. V. RUCKMAN,
J. W. MATHEWS, *Cash'r.*

UNITED STATES OF AMERICA, *State of Maryland*, } *To wit:*

On this day, the 9th of March, in the year of our Lord eighteen hundred and seventy-seven, at the request of the Farmers' and Merchants' Nat. Bank of Balto., bearer of the original promissory note, whereof a true copy is above written, I, Th. Harris Hodges, notary public, by letters patent under the great seal of the State of
30 Maryland, commissioned and duly qualified, residing in the city of Baltimore, in the State aforesaid, presented the said promissory note at the Farmers' and Merchants' Nat. Bank of Baltimore, where it is made payable, and demanded payment of the same, — was answered "No funds."

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, as well against the maker and endorsers of the said promissory note as all others whom it may concern, for exchange, re-exchange, and all costs, charges, damages, and interest suffered and to be suffered for want of payment of the said promissory note.

Thus done and protested, at the city of Baltimore aforesaid, and on the same day I addressed written notices to the endorsers of said promissory note, informing them that it had not been paid, payment therefor having been demanded and refused, and that they would be held responsible for the payment thereof, and mailed notices, under cover for the maker and endorsers, directed to J. W. Mathews, Esqr., cash'r Bank of Lewisburg, Lewisburg, W. Va., and also mailed duplicate notice, under cover, for the maker, directed to Robert J. Glendy, Esqr., Lewisburg, W. Va., all same day.

In testimony whereof I have hereunto set my hand and affixed my seal notarial the day and year aforesaid.

(Signed) THO. HARRIS HODGES,
Notary Public.

Protest	2 00
Postage	06
	2 06

30½ At a district court of the United States for the district of West Virginia, holden at Charleston on the 10th day of November, 1877.

Among the proceedings had was the following, to wit:

31 H. W. SHEFFEY *et als.*, Trustees, &c., *vs.* THE BANK OF LEWISBURG *et al.* } In Chancery.

The plaintiffs appeared and waived their exceptions to the answer of the defendant, The Bank of Lewisburg, and thereupon the cause was heard upon the defendant, The Bank of Lewisburg's, motion to dissolve the plaintiffs' injunction and was argued by counsel; upon consideration of which the court doth take time to consider the matters of law arising upon the motion aforesaid.

And, by consent of the parties, it is adjudged, ordered, and decreed that James Bumgardner, Jr., and Hugh W. Sheffey, trustees in the deed, Exhibit No. 1, filed with the bill, and Alexander F. Mathews, trustee in the deed No. 2, filed with the same, do proceed to sell a tract of land known as the Stuart M'Clung farm, containing about 1,200 acres, and also a tract of about 100 acres on Hughart's creek, both situated in Greenbrier county, West Virginia, and more particularly described in said deeds filed as Exhibits No. 1 and 2 of the bill.

The sale to take place in the town of Lewisburg, West Virginia, after said trustees shall have given sixty days' notice of the time, terms, and manner of sale by advertisement published for eight successive weeks in two newspapers, one to be published in the said town of Lewisburg and the other in the city of Staunton, in the State of Virginia.

The said sale to be at public auction to the highest bidder. The purchaser to pay 20 per cent. of the purchase-money in hand
32 and the residue in three equal instalments at one, two, and three years, bond with good personal security to be taken for the deferred instalments, bearing interest from date of sale.

And the said trustees are required to report their proceedings to this court.

It is further adjudged, ordered, and decreed that this cause be referred to D. C. Gallaher, one of the commissioners of this court, to ascertain and report who are the creditors of the defendant, R. J. Glendy, intended to be secured by the deed of trust dated November 21st, 1876, filed as Exhibit No. 1 with the plaintiffs' bill.

But before taking the account aforesaid he shall give notice of the time, manner, and place by notice published for four successive weeks in some newspaper published in Greenbrier county, West Virginia, which shall be equivalent to personal service upon all the creditors secured in said deed.

And in the event of [that] a master commissioner of any court sitting in Augusta county, Virginia, shall have ascertained and made report who are the creditors of R. J. Glendy secured by the trust deed aforesaid, under the provisions of said deed, and the amounts, respectively, due and a duly authenticated copy of said report shall be filed before the said commissioner, Gallaher, he shall take the same as *prima facie* true, but liable to such exceptions as any creditor may choose to make.

And the said commissioner shall report any other matter deemed pertinent by himself or required by any creditor of said Glendy to this court.

33 UNITED STATES OF AMERICA:

In the District Court of the District of West Virginia, Sitting at Charleston.

The amended and supplemental answer of The Bank of Lewisburg to a bill of complaint filed against it and others in said court by Hugh W. Sheffey and James Bumgardner, trustees, &c.

The respondent here refers to and makes its original answer and demurrer filed to said bill a part of this amended and supplemental answer; and in addition to the facts and matters therein contained it relies upon the following, the material parts of which have arisen or come to the knowledge of respondent since the filing of said original answer:

That about the year 1830 one Andrew M'Clung died intestate seized of valuable lands in Greenbrier county, leaving eight children, two of whom soon after died intestate and without issue, thus leaving but six children to inherit the entire estate of said Andrew M'Clung, dec'd, to wit, Stuart M'Clung and his five sisters, Mrs. Williams, Mrs. Crawford, Mrs. Beirne, Mrs. Smith, and Mrs. Tyree; that the said Stuart M'Clung, prior to his death, which occurred about the year 1873, purchased, it is believed, the interests of all his sisters in said lands; that to some of them he paid the purchase-money in full and to others he owed the greater part of the purchase-money for the land purchased from them; but he never ob-

34 tained deeds of conveyance for said land from either of his sisters, and so far as appears he never had any written contract of purchase from any of them for any part of said lands; that the lands aforesaid, together with a tract of about 120 acres purchased by said Stuart from Kincaid, and about 24 acres purchased by same from Wallace, constituted and were generally known as the "Stuart M'Clung lands," in Greenbrier county, and are the same that are mentioned and conveyed with deed to plaintiffs, filed as Exhibit No. 1 with their bill.

That the said Stuart M'Clung, by deed dated on the 9th day of November, 1865, conveyed his interests in the land aforesaid to Mason Mathews, trustee, to secure a debt due to the defendant Glendy; that subsequently three suits were brought in the circuit court of Greenbrier county, the first by Albert M'Clung, adm'r, *vs.* Stuart M'Clung and others, to set aside said trust deed and enforce the payment of debt due from said Stuart; the second by George Seawright *vs.* Stuart M. Crawford and others, and the third by R. F. Dennis, guardian, &c., *vs.* Taylor and others—the two latter to enforce the payment of purchase-money due from said Stuart M'Clung on the interests of his sisters in the lands purchased by him as aforesaid; that under decrees in said suits the respective lands in the bill mentioned were sold and the said R. J. Glendy became the purchaser of each and said sales were confirmed by the court; that said Glendy, after the purchases aforesaid and before any conveyance was made to him of any of said lands, executed to the plaintiffs the trust
35 deed filed with their bill as "Exhibit No. 1."

That on the 26th day of March, 1878, this respondent obtained against said Glendy a judgment in the circuit court of Greenbrier county for the sum of $15,900.75, with interest thereon from the 13th day of February, 1878, till paid, and $4.65 costs, an abstract of which judgment was on the same day duly docketed on the judgment-lien docket in the clerk's office of the county court of said county. Copies of said judgment and abstract are herewith filed as Exhibits "A" and "B," respectively.

That by three several deeds, all dated on the 7th day of March, 1878, the one executed by Mason Mathews, trustee and commissioner, and the other two by W. C. Woodson, commissioner, under decrees in the suits aforesaid, the lands aforesaid were conveyed to said Glendy and said deeds were on the 27th day of March, 1878, duly admitted to record in the clerk's office of the county court of Greenbrier county, exemplified copies of which are herewith filed as Exhibits "C," "D," and "E," respectively.

That after said last-mentioned deeds were admitted to record and on the same day the execution of the trust deed, filed as "Exhibit No. 2" with the plaintiff's bill, was fully proved and duly admitted to record in the clerk's office of the county court of said Greenbrier county, as shown by said deed and the endorsements thereon, herewith filed as Exhibit No. 2; that the debt secured in said trust deed, Exhibit No. 2, and the debt upon which the judgment aforesaid
36 was obtained is the same debt, and no part of it has ever been paid, but the whole thereof is still due to respondent.

That from the foregoing facts, which the respondent avers to be true, it is shown that at the time the said Glendy executed the said trust deed to the plaintiffs, filed as "Exhibit No. 1" with their bill, he was the owner of a mere equitable title, and that he did not become vested with the legal title to said lands until the aforesaid deeds were made to him by Com'rs Mathews and Woodson, which were admitted to record on the 27th day of March, 1878, as aforesaid; that the said trust deed, "Exhibit No. 1," to the plaintiffs is a new assignment of an equity without any warranty whatever,

and places the plaintiffs and the *cestuis que trusts* in the same position of their grantor and without any additional rights; that the said Glendy having parted with his equity to the lands, the plaintiffs, by the subsequent deeds to them, took the lands subject to the prior conveyance made to secure respondent; that the said deed, "Exhibit No. 1," to the plaintiffs, having been made before the said Glendy acquired the legal title to the land therein conveyed, does not operate as notice to a prior purchaser by reason of its recordation before the conveyance to such prior purchaser was recorded. Code, page 475, ch. 74, sec. 10. Consequently in law and equity the lien created by the plaintiff's deed, if it can have any effect at all, must be postponed and be held subject to the liens of both the trust deed and judgment of respondent.

37 Having answered fully, this respondent prays that the injunction heretofore awarded the plaintiffs may be dissolved and the plaintiff's bill dismissed with costs, &c.

THE BANK OF LEWISBURG,
[SEAL.] By A. C. SNYDER, *Pres't.*

STATE OF WEST VIRGINIA, }
County of Greenbrier, } *ss:*

The foregoing answer of the Bank of Lewisburg was this 3rd day of April, 1878, taken before me under the common seal of the said corporation, as by its said seal affixed appears.

J. ALEX. MONTGOMERY,
Notary Public.

CIRCUIT COURT CLERK'S OFFICE,
GREENBRIER COUNTY, *March 26th*, 1878.

THE BANK OF LEWISBURG, Plaintiff,
against } In Debt.
ROBERT J. GLENDY, Defendant.

Robert J. Glendy, the defendant in the above-recited cause, by Mark L. Spotts, his attorney-in-fact, acting under a power of attorney under the hand and seal of the defendant, R. J. Glendy, acknowledges the plaintiff's action for the sum of ($15,900.75) fifteen thousand nine hundred dollars and seventy-five cents, with interest thereon from the 13th day of February, 1878, until paid, and the cost here expended.

Given under my hand and seal this 26th day of March,
38 1878.

ROB'T J. GLENDY, [SEAL.]
By his attorney-in-fact, MARK L. SPOTT.

Therefore it is considered that the plaintiff recover against the defendant, Robert J. Glendy, the sum of fifteen thousand nine hundred dollars and seventy-five cents ($15,900.75), with legal interest

thereon from the 13th day of February, 1878, until paid, and his costs by him about his suit in this behalf expended.

Teste: J. MAYS, *Clerk.*

A copy.

Teste: J. MAYS, *Clerk.*

THE STATE OF WEST VIRGINIA, }
Greenbrier County Court Clerk's Office, } *To wit:*

CIRCUIT COURT CLERK'S OFFICE,
GREENBRIER COUNTY, *March 26th*, 1878.

THE BANK OF LEWISBURG, Plaintiff, }
vs. } In Debt.
ROBERT J. GLENDY, Defendant. }

Judgment confessed for the sum of fifteen thousand nine hundred dollars and seventy-five cents ($15,900.75), with legal interest thereon from the 13th day of February, 1878, till paid, and the costs, $4.65.

An abstract.

Attest: JONATHAN MAYS, *Clerk.*

A copy.

Teste: MARK L. SPOTTS, *Clerk.*

39 The foregoing judgment has been regularly entered upon the judgment-lien docket of the county court of Greenbrier county on the 26th day of March, 1878.

Teste: MARK L. SPOTTS, *Clerk*

And at another day, to wit, at a district court of the United States for the district of West Viginia, held at Charleston, in said district, on the 4th day of May, 1878.

SHEFFEY and BUMGARDNER, Trustees,
vs.
BANK OF LEWISBURG and Others.

This cause came on again to be heard upon the papers formerly read and upon motion of the defendants to file the amended and supplemental answer of the Bank of Lewisburg and the objection of the plaintiffs to the filing of said amended answer, the plaintiffs waiving formal and technical notice of same, and was argued by counsel. On consideration whereof, the court being of opinion that the facts stated in said amended and supplemental answer cannot properly be set up by way of amended answer, and that they are, if properly pleaded, wholly immaterial to the issues involved in the cause, and, if true, can have no bearing upon the rights of the parties as asserted in the cause, it is therefore adjudged, ordered, and decreed that leave to file said supplemental and amended answer be denied to said defendants, and that said answer be rejected.

It is further adjudged, ordered, and decreed that the injunction awarded by former order entered in this cause be perpet-
40 uated, and that the fund arising from the sale of the M'Clung farm, situate in the county of Greenbrier, be brought into

this court, to be by it distributed in accordance with the provisions of the deed of Robert J. Glendy to Hugh W. Sheffey and James Bumgardner, Jr., bearing date on the 20th day of November, 1876.

It is further ordered that the commissioners heretofore appointed by the order of this court proceed to sell said M'Clung farm, as directed in said decree, and if when said land is offered for sale no bid is made for same adequate in the opinion of said commissioners that said commissioners shall by private contract or public auction rent said land for the term of one year or less upon such terms as said commissioners shall deem expedient.

LEWISBURG, WEST VIRGINIA, *May 7th*, 1878.

To the district court of the United States for the district of West Virginia:

The undersigned trustees, acting in accordance with the directions of a decree rendered by said court at the November term, 1877, in a certain suit in chancery therein pending between Hugh W. Sheffey and James Bumgardner, Jr., trustees, and others, plaintiffs, and The Bank of Lewisburg and others, defendants, beg leave to report that after advertising time, place, and terms of sale in the Staunton Spectator and the Greenbrier Independent for eight consecutive weeks, as directed by said decree, the undersigned convened
41 in Lewisburg on the 5th day of April, 1878, the time and place appointed in the advertisement, at which time, in consequence of certain changes in regard to the title of the property which occurred since the decree directing the sale was rendered, and which, in the opinion of two of the undersigned trustees, made it expedient to postpone the sale, the undersigned caused it to be publicly announced by the crier that the sale was postponed until the 7th day of May, 1878, and such postponement was advertised by continuous publication in the Staunton Spectator and the Greenbrier Independent.

That on the 7th day of May, 1878, the undersigned offered the land for sale in parcels, with the announcement of the following reservation, viz: That after the bidding for the parcels was concluded that the land would be offered as a whole, and in the event that the amount bid for the land as a whole exceeded the aggregate amount bid for the parcels that the land would be knocked down to the highest bidder for the whole tract.

The division into parcels is shown by the plat of Jesse Bright and the auctioneer's memorandum, which are herewith returned as a part of this report.

For parcel No. 1, 69½ acres, B. F. Harlow was the highest bidder, at $17.25 per acre—amounting to $1,198.87½.

For parcel No. 2, 167½ acres, Joseph Griffie was the highest bidder, at $12.00 per acre—amounting to $2,010.00.

For parcel No. 3, 455¾ acres, A. H. Holt was the highest bidder, at $12.00 per acre—amounting to $5,469.00.

For parcel No. 4, 382 acres, A. H. Holt was the highest
42 bidder, at $12.00 per acre—amounting to $4,584.00, the bids for the parcels aggregating $13,261.87½.

For the land as a whole S. B. Williams was the highest bidder, at the price of $16,820.00, and the land was accordingly knocked down to him, of which amount he settled with the undersigned, the 20 per cent. required as cash, as follows: Cash, $980.25, negotiable notes at five months, endorsed by A. B. Stuart; $2,443.83, net value; $2,383.75, net value of notes, and cash being $3,364.00, 20 per cent. of $16,820.00, and for the balance of $13,456.00 executed his three bonds, each for $4,485.33⅓, all dated May 7th, 1878, and due one, two, & three years after date, with interest from date, with James Knight as surety in the first and A. B. Stuart as surety in the second and third.

Aggregate amount of sale		$16,820 00
Cash received by trustees	$980 25	
Net amount of negotiable notes	2,383 75	
1st bond of S. B. Williams and James Knight	4,485 33⅓	
2nd bond, S. B. Williams & A. B. Stuart	4,485 33⅓	
3rd bond of S. B. Williams and A. B. Stuart	4,485 33⅓	
	$16,820 00	$16,820 00
43 Amount of actual cash received		$980 25
Disbursed to surveyor, fee	24 00	
Disbursed to auctioneers, "	15 00	
" " Spectator, printing fee	45 75	
" " Independent, " "	54 50	
" commissions	841 00	
	$980 25	$980 25

For which disbursements vouchers are herewith returned.

The undersigned will further state that after the sale was made to S. B. Williams, as above stated, Joseph Griffie, who was the highest bidder for parcel No. 2, containing 167½ acres, at $12.00 per acre, amounting to $2,010.00, proposed to said Williams and the undersigned to take the said parcel No. 2 at the price bid for the same, and pay $500.00 in cash and give his bond to the undersigned, upon the terms of sale, for the remainder, and if such action be approved by the court that the amount of his bonds be credited on the bonds of said Williams and his said bonds be held by the undersigned, and when paid that said parcel No. 2 be conveyed to him, and in the event that the court declined to approve of the sale to Griffie as a separate sale that the $500.00 cash be refunded to him, said Williams, and his bonds be returned, and said Williams stand as purchaser of the whole, as originally; and the undersigned agreed to said proposition, subject to the approval of the court, and the said S. B. Williams also assented to the same, and accordingly said Griffie paid $500.00 of the cash received and executed to the under-

signed his three bonds, each for the sum of $503.33⅓, dated
44 May 7th, 1878, payable in one, two, and three — after date, with interest from date, with A. C. Snyder as security.

The undersigned see no reason why the sale to said Griffie should not be approved, and so recommend, and also recommend that the sale to Williams be confirmed.

JAMES BUMGARDNER, JR.,
HUGH W. SHEFFEY,
ALEX. F. MATHEWS,
Trustees and Commissioners.

45 And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, in said district, on the 12th day of November, 1878.

SHEFFEY and BUMGARDNER, Trustees,
vs.
BANK OF LEWISBURG and *als.*

This cause came on this 12th day of November, 1878, to be again heard upon the papers formerly read and upon the report of sales made by Hugh W. Sheffey and James Bumgardner and A. F. Mathews, trustees and commissioners, on the 7th day of May, 1876, and the memorandum dated on the 7th day of May, 1878, signed by said trustees and commissioners & submitted with and as a part of said report, to which report there is no exception, and was argued by counsel.

Upon consideration whereof it is adjudged, ordered, and decreed that said report, as amended and modified by the suggestions contained in said memorandum, be confirmed.

And it is further adjudged, ordered, and decreed that Joseph Griffee, the purchaser of the tract of land containing 167½ acres from S. B. Williams, be regarded as the direct purchaser of said tract of land from said trustees and commissioners, and that the amount of his bonds for the deferred payments of said tracts of land be credited on the corresponding lands of said S. B. Williams.

And by consent of parties it is further ordered that the consideration of the petition of the defendants for a rehearing of the decree in said cause at the last term of this court be postponed until the next term of this court.

46 The petition of the Bank of Lewisburg filed in the suit of Hugh W. Sheffey and James Bumgardner, trustees, against petitioners and others, now pending in the district court of the United States for the district of West Virginia, sitting at Charleston, in said district.

To the Honorable John J. Jackson, judge of said court:

Petitioner, The Bank of Lewisburg, respectfully shows—

That at the May term, 1878, it tendered and moved to file an amended and supplemental answer in said suit, which motion was opposed by the pl'ffs, and after argument said motion was overruled and said answer disallowed, as appears from the record in said suit.

That the record does not show the grounds upon which said answer was rejected, but your honor will no doubt recollect that the court in delivering its opinion rested its action upon the ground that as the trust deed to the plaintiff was recorded prior to that of petitioner the legal title subsequently acquired by Glendy, the common grantor, inured to the benefit of the plaintiffs.

That this view of the case was not presented by the plaintiffs' counsel nor was it argued by the petitioner's counsel.

And while it may be the most tenable ground upon which the plaintiffs' case can be rested, yet petitioner is advised and respectfully submits that it is not well founded, as will appear by an exam-
47 ination of the following authorities: The plaintiffs' deed contains no covenants of any kind whatever. Under our statutes such a deed conveys nothing more than all the estate, right, title, and interest whatever, both at law and in equity, of the grantor in or to such lands.

Code, chapter 72, ss. 1 & 2, p. 463.

Such deed is therefore nothing more than a common-law quitclaim conveyance. 2 Smith's Lead. Cas. (6 Am. Ed.), 709, and case cited; Western M. & M. Co. *v.* Peytona Cannel Coal Co., 8 W. Va., 445 to 450.

At the time Glendy conveyed to pl'ffs he had in fact neither the legal nor the equitable title to the lands.

But concede that he had the equitable title and that the equitable title vested in the plaintiffs upon the recordation of their deed. This left the legal title still outstanding, and, as the plaintiffs' title was a mere quitclaim title, it could not draw to it the legal title.

Bruce *v.* Lake, 12 Am. R., 491; Wynn *v.* Harmon, 5 Gratt., 157; Doswell *v.* Buchanan, 3 Leigh, 365.

The plaintiffs' deed having neither covenants of warranty nor covenants for further conveyance, they could not acquire the legal title either by estoppel or by suit in equity to compel the conveyance of such title.

The deed could act on the subsequently acquired legal estate only by way of estoppel or rebutter, but there being no covenants of any kind there could be no estoppel or rebutter.

Jackson *vs.* Wright, 14 Johns., 193; Co. *v.* Litt., 265.

Therefore the legal title would still remain in Glendy to be operated upon by petitioner's judgment against Glendy.

Upon these authorities the petitioner prays that its motion
48 to file said amended and supplemental answer may be heard, &c.

BANK OF LEWISBURG, *Petitioner.*

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, in said district, on the 2d day of August, 1878.

H. W. SHEFFEY and Others, Trustees,
vs.
BANK OF LEWISBURG and Others. } In Chancery.

This day the defendant, The Bank of Lewisburg, appeared in court, by counsel, and tendered its petition for a rehearing of the order made in this cause at the last term, except so far as it directs a sale of the trust property, for errors in law apparent on its face; and thereupon the plaintiffs, by their counsel, appeared and objected to the filing of said petition, and the court, without passing upon the matters, ordered the same to be set for hearing at the next term of this court, to which time this cause is continued.

49 In the United States District Court for the District of West Virginia, Sitting at Charleston.

SHEFFEY and BUMGARDNER, Complainants,
vs.
BANK OF LEWISBURG and *als.*, Defendants. } In Chancery.

The Separate Answer of Robert J. Glendy to the Bill.

To the Honorable John J. Jackson, judge of said court:

Respondent, answering, says he believes the allegations of the bill are true; and having fully answered he prays to be dismissed with costs.

ROBERT J. GLENDY.

STATE OF VIRGINIA,
County of Augusta, } *To wit:*

Robert J. Glendy this day made oath before the undersigned, a notary public of and for the county aforesaid, in the State aforesaid, that the matters of the foregoing answer, so far as they are alleged upon his own information, are true, and so far as alleged upon the information of others he believes them to be true.

In testimony whereof I have hereunto affixed my notarial seal and attached my signature this 9th day of January, 1884.

[SEAL.]

LEWIS M. BUMGARDNER,
Notary Public.

50 And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, in said district, on the 2nd day of May, 1882.

SHEFFEY and BUMGARDNER
vs.
BANK OF LEWISBURG. } In Chancery.

It appearing from the report of sales made in this cause on the 7th day of May, 1878, by Commissioners James Bumgardner, Jr., Hugh W. Sheffey, and Alexander F. Mathews that on the 7th day of May, 1878, the said commissioners sold and Joseph

Griffee bought tract No. 2, described in such report, consisting of 167½ acres, at $12.00 per acre, amounting to $2,010.00, and that he perfected his purchase, it is ordered, adjudged, and decreed that Alex. F. Mathews, who is hereby appointed a special commissioner for that purpose, shall, so soon as said Griffee shall pay the purchase-money, make to the said Griffee a proper conveyance for said land, for which said purchaser shall pay him a fee of $5.00.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, in said district, on the 13th day of November, 1885.

SHEFFEY and BUMGARDNER, Trustees, &c., *vs.* THE BANK OF LEWISBURG and *als.* } In Chancery. Decree, Nove. T., 1885.

This cause came on to be further heard at this term and was argued by counsel, and the court being of opinion that the decree rendered May 4th, 1878, having been rendered before the master commissioner had executed the order of reference made at the November term, 1877, was premature, it is therefore adjudged, ordered, and decreed that the said decree of the May term,
51 1878, be, and it is hereby, set aside and held for naught; and it is further adjudged, ordered, and decreed that the exceptions taken by the Bank of Lewisburg to the report of Commissioner Gallaher, dated Sept. 20th, 1883, and filed October 1st, 1883, because the said commissioner failed to mention and report in any way the debts asserted and claimed in this cause by the said bank, be sustained, and that the said report be recommitted to the master without the court at this time passing further upon said exceptions, with instructions to inquire into, ascertain, and report the following matters and accounts, viz:

1st. An account of the debt of R. J. Glendy intended to be secured by the deed of trust dated Nov. 21st, 1876, filed as Exhibit No. 1 with plaintiffs' bill, with their respective amounts, dignities, and priorities.

2nd. A similar account and statement of the debts secured by the deed of trust of October 11th, 1875, a copy of which is filed with the plaintiffs' bill as Exhibit No. 2.

3rd. Whether the debts claimed by the Bank of Lewisburg in its answer was a paramount lien upon the lands, or any of them, of the said Glendy conveyed by the said deed of November 21st, 1876, at the date of its execution, and therefore, under its provisions, entitled to preference and priority as a preferred debt of the first class and to be paid in full before anything else is paid upon the general debts of the second class secured by said deed.

4th. Whether the said debts of the Bank of Lewisburg are entitled to the preference claimed for them over the other debts se-
52 cured by the said deed of trust of November 21st, 1876, by reason of their having been secured by the said older deed of trust of October 11th, 1875.

5th. Any other matter to be specially stated, deemed pertinent by

the said commissioner or requested by any party; and the said commissioner shall report his proceedings under this decree to the next term of this court.

But before executing this decree the said commissioner shall give notice, by advertisement published for four consecutive weeks in the Greenbrier Independent, a newspaper published in Greenbrier county, and by personal notice to the attorneys — record, of the time and place when and where he will do so.

And in the event that a master commissioner of any court sitting in Augusta county, Virginia, shall have ascertained and made report as to the debts or any of them secured by the trust deed of November 21st, 1876, and a duly authenticated copy of said report shall be filed before Commissioner Gallaher, he shall take the same as *prima facie* true to the extent of said debts thus reported, but liable to such exceptions as any creditor may choose to make; and said Commissioner Gallaher in making said account and report shall read and consider all testimony heretofore taken and all that may be hereafter taken in this cause.

And upon motion of the plaintiffs and with the assent of the defendants the bill is amended by inserting after the words "Alexander F. Mathews, the Bank of Lewisburg," the following: "The said
53 Bank of Lewisburg being a corporation duly created and organized under and by the State of West Virginia, and its principal office being in West Virginia and doing its business in West Virginia, and the same being a mere formal amend ment, no process is awarded to answer said bill as thus amended."

The report of Commissioner D. C. Gallaher, made in this cause, is in the words and figures following, to wit:

United States District Court for the District of West Virginia.

SHEFFEY and BUMGARDNER, Trustees, &c., *vs.* BANK OF LEWISBURG, &c. } In Equity.

COMMISSIONER'S OFFICE, CHARLESTON, *Oct.* 21*st*, 1886.

Hon. John J. Jackson, judge of said court:

By a decree entered herein this cause was, the 18th November, 1885, recommitted to the undersigned to take an account and report certain things therein named and more fully set out hereinafter.

54 The notice required to be given was had, as will appear from the appended certificate on next page.

STATE OF WEST VIRGINIA, *Greenbrier County*, } *To wit:*

I, B. F. Harlow, editor of the Greenbrier Independent, a newspaper published in the town of Lewisburg, State and county aforesaid, do hereby certify that the annexed notice was published for four weeks successively in said paper; that a copy of the same was duly posted at the front door of the court-house of said county, and

that the first publication of said notice was on the 18th day of February, 1886.

Given under my hand as editor of said paper this 27th day of October, 1886.

B. F. HARLOW.

Printer's fee, $15.00.

Commissioner's Notice.

In the District Court of the United States for the District of West Virginia.

SHEFFEY and BUMGARDNER, Trustees, &c., *vs.* THE BANK OF LEWISBURG and Others. } In Chancery.

55 Parties to the above cause will take notice that pursuant to a decree entered therein at the November term, 1885, of said court I shall, at my office, in Charleston, W. Va., at 10 a. m. Monday, March 22nd, 1886, take an account and report thereon showing—

1st. An account of the debts of Robert J. Glendy intended to be secured by the deed of trust dated November 21st, 1876, filed as Exhibit No. 1 with plaintiffs' bill, with their respective amounts, dignities, and priorities.

2nd. A similar account and statement of the debts secured by the deed of trust of October 11th, 1875, a copy of which is filed with plaintiffs' bill as Exhibit No. 2.

3rd. Whether the debts claimed by the Bank of Lewisburg in its answer was a paramount lien upon the lands or any of them of the said Glendy conveyed by the said deed of November 21st, 1876, at the date of its execution, and therefore, under its provisions, entitled to preference and priority as a preferred debt of the first class and to be paid in full before anything is paid upon the general debts of the second class secured by said deed.

4th. Whether the said debts of the Bank of Lewisburg are entitled to the preference claimed by them over the other debts secured by the said deed of trust of November 21st, 1876, by reason of their having been secured by the said older deed of trust October 11th, 1875.

5th. Any other matters to be specifically stated, deemed pertinent by the commissioner or required by any party; and the said
56 commissioner shall report his proceedings under this decree to the next term of this court.

The taking of this account shall, for cause, be adjourned from time to time until completed.

Given under my hand this 10th day of February, 1886.

D. C. GALLAHER,
Com'r U. S. Dist. Court.

The notice was published in the Greenbrier Independent, the first publication being had the 18th February, 1886, and was continued for four successive weeks.

I fixed my office in Charleston, in said district, and Monday, March 22nd, 1886, as the time and place for opening the account.

I submit the following report:

At the time and place fixed by me the account was duly opened and kept open until this report was completed.

The pardonable delay of counsel in fixing their respective briefs prevented an earlier report by me.

Exceptions to My Former Report.

These were taken by the Bank of Lewisburg and, as they involve matters specifically referred to me, will be treated and reported upon under the proper inquiry submitted by the order of reference.

The first inquiry is as follows:

1st Requirement.

An account of the debts of R. J. Glendy intended to be secured by the deed of trust dated November 21st, 1876, filed as Ex-
57 hibit No. 1 with plaintiffs' bill, with their respective amounts, dignities, and priorities:

Note.

The order of reference provides that "in the event" that a master commissioner of any "court sitting in Augusta county, Virginia, shall have ascertained and made report as to the debts or any of them secured by the trust deed of Nov. 21st, 1876, and a duly authenticated copy of such report shall be filed before Commissioner Gallaher, he shall take the same as *prima facie* true to the extent of said debts reported, but liable to such exceptions as any creditor may choose to make, and said Commissioner Gallaher shall, in making said account and report, read and consider all testimony heretofore taken and all that may be hereafter taken in this case."

Commissioner John Kinney, of the Augusta circuit court, Va., has filed before me certified copies and extracts from his report marked Exhibits J, K, Nos. 1 and 2, respectively. The balance on hand subject to dividends and costs under trust deed of November 21st, 1876, is $9,646.50, which includes costs.

The liens and priorities and amounts secured or intended to be secured by the trust deed of November 20th, 1876, to Sheffey and Bumgardner, trustees:

Note.

Taking the reports or extracts therefrom of Master Commissioner John Kinney as *prima facie* correct, I find that various judgment liens which were "paramount" at the date of the trust deed to
58 Sheffey and Bumgardner have been asserted, allowed, and nearly all paid in the circuit court of Augusta county, Virginia.

Commissioner Kinney's reports filed before me do not show the precise sum realized by the trustees, but show the judgment and other liens paid off, and also show that, reserving in the hands of the trustee a sum sufficient to pay off all liens prior to the Sheffey and Bumgardner trust, there was a balance of $9,646.50, as of No-

vember 1st, 1882, for distribution to the general liabilities under said trust secured.

All prior judgments were paid, excepting one to Eliza Kerr's committee, amounting to	290 45
One to James Gardner's adm'r, for Sterrett	1,803 50
	$2,093 95
Amount of balance in trustee's hands	$11,044 00
Deduct commissions on receipts from Mrs. Glendy	197 50
	$10,846 50
Off judgments *supra*, say	2,094 00
	$8,752 50
Am't received from personal prop'ty	894 00
Bal. on hand	$9,646 50

59 *Recapitulation of Judgments and Other Liens Binding Lands of R. J. Glendy.*

Class.

Name of owner of liens.	County in which registered.	Interest-bearing sum.	Am't due Nov. 1st, 1887.
Joseph H. Lantz	Highland	$340 74	$688 30
Andrew A. Crawford	Augusta	150 00	250 12
John & Sam'l Given	Highland	350 58	649 40
Robert S. Hook	do.	259 73	495 95
B. F. Hailman, guardian			
Ella Summers	Augusta	521 97	1,013 34
Martha V. Summers	do.	521 97	982 16
Com. Eliza Kerr	do.	206 98	410 14
Joseph H. Lantz	Highland	241 20	320 18
John Lightner's ex.	Augusta	723 85	1,210 52
A. J. Summers	do.	Paid.	
Julia A. Summers	do.	Paid.	
David Fultz Lubrogee	do.	447 20	488 56
John Lightner's ex.	do.	Costs.	
John Wilson's adm'r	do.	149 27	179 12
James Bumgardner, rec'r	do.	1,323 27	1,798 95
Joel Armentrout	Highland	1,811 55	1,958 80
Jas. Gardner, adm'r for Rebecca Sterrett.	Augusta	1,039 00	1,491 82
V. H. Rodes	do. & Bath	2,921 90	3,177 56
Rebecca J. Sterrett	do.	261 62	296 93
Trust deed to Sheffey and Bumgardner, trustees.			
Total of judg'ts before deed of trust to Sheffey & Bumgardner.		$11,370 78	$15,411 85

60 *Creditors Unpaid and Secured in the Trust Deed of November 21st, 1876.*

Names.	Amount due Nov. 1st, 1882.	Amount paid Dec. 5, 1882.	Bal. due Nov. 1, 1883.
Nat. Valley Bank of Staunton	$11,066 80	$420 55	$11,132 91
G. W. M'Clintic	2,101 00	79 85	2,116 83
M. H. Effinger	9,240 27	351 10	9,297 26
Wm. Ramsey	1,363 00	51 80	1,371 20
S. W. Miller	325 45	12 35	327 45
Charles Levisay	1,983 70	75 35	1,995 83
A. W. Mathews	306 45	11 65	308 30
George Robinson	339 40	12 90	340 60
Jordon and Miller	1,423 65	54 10	1,432 25
Allison & Addison	144 70	5 50	145 56
Glendy & Trollinger	6,171 90	234 50	6,211 03
Geo. H. Smith	855 00	32 50	869 50
Jos. D. Pownall	3,197 85	121 50	3,220 07
B. A. Givens	203 00	7 70	204 30
A. D. S. Beck	1,305 45	49 60	1,312 37
Jas. A. M'Clung	4,580 55	174 05	4,605 65
Alex. Knight, 2 debts	5,910 40	224 60	5,956 34
Edward Bulger	248 45	9 45	249 71
Jno. W. Alby	288 30	10 95	290 07
A. B. Kincaid	21 68	80	21 83
A. F. Mathews	551 17	20 95	554 54
David Wiley	2,926 80	111 20	2,945 20
David Given	851 60	32 85	859 63
Lewis Meyers	6,101 62	231 90	6,147 12
Sheffey and Bumgardner	165 76	6 30	166 18
H'rs of Sam. Blackburn	4,047 50	153 80	4,162 60
B. F. Renick	4,199 00	159 60	4,233 20
Augusta Nat. B'k, Staunton	17,053 80	648 20	17,093 50
Arbogast, Levi	581 10	22 10	583 46
Arbogast, George	551 85	21 00	554 55
Arbogast, Benja.	1,726 50	65 60	1,739 80
Bevenage, Wesley	39 25	1 50	39 55
Bird, Jno. W.	197 00	7 50	198 50
Bird, Peter	171 50	6 50	172 64
Bretton, J. F. & Geo. W.	3,343 40	127 05	3,369 35
Cooper, Levi & S. P.	1,591 75	60 50	1,601 48
Cooper, Levi	92 50	3 50	93 43
Cooper, E. B.	389 40	14 80	392 49
Campbell, D. H., two debts	478 80	18 20	482 50
Campbell, Susan	98 25	3 75	99 00
Campbell, J. Brown	144 50	5 50	144 60
Colon, George	65 40	2 50	65 90
Dever, Jasper	66 85	2 55	67 30
Dever, Frances	755 45	28 70	761 27
Dever, Hugh	783 65	29 75	789 90
Effinger, M. Harvey	13,068 85	496 60	13,172 25
Eagle, S. C.	2,082 80	79 15	2,098 05
Farmers' & Merc'ts' Nat. B'k of Baltimore	19,384 00	736 60	19,547 40
61 Gilmore, Alex.	1,027 25	39 00	1,036 16
Gum, Amos	134 00	5 10	134 90
Gum, John E.	855 40	32 50	861 90
Gibson, Samuel L.	1,546 70	58 75	1,558 73

Creditors—Continued.

Names.	Amount due Nov. 1st, 1882.	Amount paid Dec. 5, 1882.	Bal. due Nov. 1, 1883.
Gibson, William	$883 45	$33 55	$890 37
Gibson, John L.	806 40	30 65	812 71
Gwin, John	306 90	11 65	308 61
Gwin, B. A.	316 90	23 35	321 77
Gwin, David	1,287 10	48 90	1,294 66
Gay, John	1,381 20	52 50	1,391 36
Hooper, Samuel H.	9,592 65	364 50	9,662 07
Hevener, George W.	2,758 75	104 80	2,780 85
Hevener, William	2,121 75	80 60	2,138 33
Hevener, Uriah	2,621 10	99 60	2,641 50
Hansel, B. & John H.	1,111 10	42 25	1,119 73
Kincaid, Peter H.	293 70	11 15	306 05
Lightner, Jacob	108 00	4 10	108 85
Lightner, Samuel	65 40	2 50	65 90
Lockridge, Robert	774 55	29 40	781 65
Moffett, Robert H.	2,201 20	83 65	2,218 91
M'Daniel, William	345 00	13 10	347 50
Moore, Isaac	2,814 20	106 95	2,837 98
M'Laughlin, George D.	104 40	3 95	105 25
Nat. Val. Bank, Staunton	22,880 30	869 45	23,060 85
Patterson, S. P.	130 85	5 00	131 85
Pownall, Joseph D.	8,154 50	309 90	8,219 96
Ruckman, Jno. W.	1,256 95	47 75	1,266 22
Rider, Geo. W.	439 65	16 70	441 81
Siran, Jonathan	833 10	31 65	837 72
Seibert, Henry, and Son	1,759 75	66 90	1,773 47
Shumate, Jacob L.	44 40	1 70	44 63
Stephenson, Adam	1,947 35	74 00	1,962 63
Sillington, Robert	1,860 15	70 70	1,875 00
Stephenson, L. H., assignee	329 20	12 50	331 70
Stephenson, L. H., commissioner	3,267 50	124 15	3,282 35
Tomlinson, H. M.	130 85	5 00	131 85
Trimble, John	65 40	2 50	65 90
Weiser, Carl, and Son	12,838 75	488 30	12,950 45
Wade, James W.	256 45	9 75	258 19
Wallace, John S.	35 00	1 35	34 20
Wade, Anson O.	1,370 40	52 10	1,387 18
Wiley, M. F.	1,755 75	66 70	1,769 21
Wade, Stephen S.	196 00	7 45	196 90
Wiley, James C.	123 30	4 70	124 26
Nat. Val. B'k, Staunton, Nelson	9,732 00	369 80	9,792 82
Nat. Val. B'k, Staunton, Warwick	5,428 70	206 30	5,462 40
James, M. Sieg.	2,354 95	89 50	2,370 39
Robinson, Maria	42 65	1 60	42 17
Summers, Julia A.	5,400 00	205 00	5,435 00
Grand totals	$248,978 80	$9,461 45	$250,736 22

To this must be added the debt due Bank of Lewisburg, for whose amount see next page.

62 The debt due Bank of Lewisburg is entitled to share *pari passu* with the foregoing debts in the funds in the hands of the trustees—$9,646.00—and also in the funds in this suit under control of this court, and the bank should be paid also its dividends, which dividends the trustees have paid on other debts, as set out in next preceding pages, and thus be first equalized in dividends.

The amount due the bank on the 1st November, 1882 (the date of dividend), was $31,350.17.

2nd Requirement.

A similar account and statement of the debts secured by the deed of trust of October 11th, 1875, a copy of which is filed with the plaintiffs' bill as Exhibit No. 2:

Note.

As the 3rd and 4th requirements specifically call for a report upon the respective validity and priority of the trust deed of November 21st, 1876, and the trust deed of Oct. 11th, 1875, I shall not here do other than simply report the amount secured by the trust deed of October 11th, 1875.

It is immaterial, I apprehend, that the first and second requirements differ in their phraseology, in that the former says "intended to be secured," while the latter does not.

The trust deed of October 11th, 1875, secures two notes—one for $10,000.00, due October 14th, 1875, and one for $5,000.00, due October 22nd, 1875—and any other debts said Glendy may here-
63 after owe said bank by renewals, original loans, &c., &c., provided it shall not exceed $15,000.00.

Statement as of November 1st, 1886:		
One note for	$10,000 00	
Interest from October 14th, 1875, to November 1st, 1886	6,628 33	
		$16,628 33
One note for	$5,000 00	
Int. from Oct. 22, '75, to Nov. 1, '86	3,321 84	
		8,321 84
Total		$24,950 17

3rd Requirement.

Whether the debts claimed by the Bank of Lewisburg in its answer was a "paramount" lien upon the lands or any of them of the said Glendy conveyed by the said deed of November 21st, 1876, at the date of its execution, and therefore, under its provisions, entitled to preference and priority as a preferred debt of the first class and to be paid in full before anything is paid upon the general debts of the second class secured by said deed:

If said debt was a "paramount" lien at the date of the execution of said deed there can be no question but that it is entitled "to be paid in full before anything is paid upon the general debts of the second class secured by said deed." But was it a paramount lien at that date?

In other words, was it at that date (the execution of the
64 Sheffey and Bumgardner trust deed) a valid, existing, and perfected superior lien to any created by the Sheffey and Bumgardner trust deed or that could have thereby been created?

As to Glendy, the grantor, and the bank it undoubtedly was.

So far as Glendy and the bank were concerned, as between themselves, the deed was "paramount" to any lien Glendy afterwards created.

But what were the facts as to other and especially as to purchasers without notice?

On the 11th October, 1875, the bank's deed doubtless lay in its private vault, and so far as the testimony shows no human eye or ear had seen or heard anything of its existence except the grantor and grantees.

The records showed no such thing. Here was a deed made and delivered more than a year previously and hidden from the sight of all men—a private, secret matter.

Here was the grantor engaged in large business transactions, for in less than a year we find his debts aggregate nearly a quarter of a million dollars, according to the report of Commissioner Kinney taken in the circuit court of Augusta county, Virginia.

The courts discourage, and rightly so, such secret dealings, and class them as fraudulent, when it is sought to prejudice creditors who have no notice of such secret dealings.

The registry laws are intended to prevent and condemn frauds and not to further and aid them.

The effort to bring home notice to Judge Sheffey, one of
65 the trustees of the deed of November 21st, 1876, seems to me utterly abortive.

The bank relied upon his testimony. He did not testify as the bank could have wished. He denies knowledge and notice. He is their witness; he is the sole testimony.

All the ingenious reasonings as to what a man must have known from surrounding circumstances, as well as all the refinements of casuistry in arguing Sheffey must have had notice, pale before the fixed and insuperable fact that he says he did not, and the bank is bound thereby.

A mere suspicion of notice will not do. (2nd vol., Minor Institutes, page 1040.)

The bank waived Judge Sheffey's oath as a witness. (Wharton, section 549.)

No man to whose honor was referred a matter of recollection, and whose professional oath was to be relied upon, could have notice such as the bank claimed and then deny it without putting himself in the light of a perjurer.

This question is so elaborate, in the able and manifold briefs be-

fore me, that it is unnecessary for me to say more than that Judge Sheffey, in my opinion, had no notice before or until after the full and complete execution and delivery of the trust deed of November 21, 1876.

The bank waived Judge Sheffey's oath and agreed that his statement should be taken instead of his deposition. They rested the question of notice upon his statement. He says he had no notice, and this seems to end it.

It is then claimed that as Sheffey admits that Glendy in-
66 formed him of the bank's trust after the execution, but before the recordation of the Sheffey and Bumgardner trust deed, therefore this notice was sufficient.

The transaction between Glendy and Sheffey and Bumgardner was closed, the deed executed and delivered for record.

Upon this subject, in the case of Vest *vs.* Michie, 31 Grat., p. 149, the court says: "The evidence of notice must be sufficient to prove him (Sheffey) in this case guilty of a fraud."

"A trustee named in a deed of trust is like a mortgagee—a purchaser for value. Both occupy the same ground with respect to notice, actual and constructive. It is that of a *bona fide* purchaser until the contrary is made to appear."

Carpenter *vs.* Longan, 16 Wallace, 271.
Croxall *vs.* Shererd, 5 Wall., 268.
Johnston & Wife *vs.* Slater & *als.*, 11 Grat., 325.
Beverly *vs.* Brooks, 2 Leigh., 425.
Tate *vs.* Liggett, 2nd Leigh., 84.

"Trustees and creditors, purchasers for value."
New Orleans, etc., Co. *vs.* Montgomery, 95 U. S., 16, *et seq.*

Minor's Institutes, vol. 2, page 1028, says: "It is sufficient if the party completes the purchase without notice."

And why should there be anything more requisite?

The transaction was closed as between Glendy and the trustees, the consideration had passed, and *non constat* that the property conveyed would not pay all the debts secured.

It was a transfer of title—in effect a sale.

Now, suppose Sheffey had purchased the land outright and had paid his money and gotten his deed and before recordation he had
67 learned even from Glendy that there was a secret mortgage lying in the Lewisburg bank, would a court of equity give preference to the bank's lien under the circumstances? I should think not.

There being then no lien recorded and no notice, actual or constructive, at the time of the execution of the trust deed to Sheffey and and Bumgardner, I cannot see that the bank's debt was at that time a "paramount" lien, and as such intended to be included in deed of November 20th, 1876; and I further find that the alleged notice to Sheffey after its execution and before the recordation of the trust of November 21, 1876, was no sufficient notice to take this case out of the rule of the statute.

I think Code, chapter 74, sec. 5, applies here. Sheffey and Bumgardner were purchasers and had no notice until after they had become such "purchasers," whether their deed was recorded or not. There is nothing in the trust deed of Nov., 21st, 1876, which gives said bank anything but security as a general creditor and subordinate to "paramount liens."

4th Requirement.

Whether the said debts of the Bank of Lewisburg are entitled to the preference claimed for them over the other debts secured by the said deed of trust of November 20th, 1876, by reason of their having been secured by the said older deed of trust of October 11th, 1875:

Quite a number of briefs have been filed in this case, and each is fertile in ingenuity and refined reasoning.

68 They are so exhaustive that there is left to me but little to say except that I have carefully read and re-read them and the authorities cited, many of which are irrelevant, and therefrom have deduced such conclusions as the law and fact seem to me to warrant. * * *

"The said older deed of trust of October 11, 1875," has been recorded twice, once on the 21 Nov., 1876, and again March 27th, 1878, the bank not trusting to its first recordation. It seems that when Glendy made these trust deeds to Sheffey and Bumgardner and to the bank he had not yet gotten in his legal title; it was still outstanding in M'Clung.

Glendy afterwards obtained it, and then it was the bank attempted to have its deed re-recorded, and it now claims that this fact inures to its benefit and to the prejudice of Sheffey and Bumgardner's trust deed.

It seems to me, however, that Glendy getting in his legal title inures to the benefit of both deeds, and no act of his can affect or change the respective vested and acquired rights of his grantees nor can he change their respective status to one another, and their antecedent vested rights remain, as to priority, &c., just as they were.

Now as to notice:

The question of notice to the trustees, Sheffey and Bumgardner, has been disposed of under the 3rd requirement.

There is no question as to the fact the bank's trust deed was executed before that to Sheffey and Bumgardner.

It is conceded by the bank's counsel (page 10 of Mr. Mathews'

69 brief) that if Sheffey and Bumgardner are purchasers for value without notice, then the bank's deed, which was not recorded, is void (sec. 5, Code, chapter 74). In my opinion, as stated under the third requirement, they were purchasers for value without notice. But how is it as to the notice the bank had?

It cannot be seriously claimed the bank had not notice both at the time of its first and of its second recordation of its deed. In the first it at least had constructive notice and in the latter case it had constructive and actual notice, and this suit had been brought and these questions all decided by at least one decree.

At the time of the first recordation by the bank of its lien, that the very equitable interest, upon which its own deed was given, had been conveyed away and actually recorded, owing to the superior diligence of Sheffey and Bumgardner, trustees, and the law encourages such diligence.

If Sheffey and Bumgardner had had notice, there might be some strength in the bank's claim upon its second recordation, or if the bank had been a purchaser without notice from M'Clung, who had the legal title, and it had known nothing of Glendy's or Sheffey or Bumgardner's dealings, but neither was the case. When the first recordation took place the bank had just what Glendy had left after the recordation of Sheffey and Bumgardner trust deed, no more and no less—simply a lien upon an equity of redemption, subject, first, to the lien of the other deed, with the legal title in M'Clung. At the time of its second recordation the bank took a lien upon an equity of redemption with the naked legal
70 title in Glendy, who had conveyed away by recorded deed all the beneficial ownership to Sheffey and Bumgardner.

Sec. 10, chapter 74, of the Code and the case of Doswell *vs.* Buchanon, 3rd Leigh., 365 (the former being the outgrowth of the latter), are confidently relied upon by the bank to maintain its claims to superior equity.

As stated before, if the bank had been a purchaser from M'Clung, the owner of the legal title, and without notice, then as between it and Sheffey and Bumgardner, who claimed from Glendy, who had only an equity of redemption, it might claim not to be affected.

I have read Doswell *vs.* Buchanon carefully, but that case and this are not similar, and I do not see the application of the Code and the principle laid down in Doswell *vs.* Buchanon to this case.

So, too, the judgment obtained by the bank, obtained long after this suit was brought, March 28th, 1878, bound just what interest Glendy had at the time of its rendition, no more and no less; and what was it? Simply a mere naked, legal title, with a beneficial interest already conveyed away to Sheffey and Bumgardner, trustees, and as such it was a lien, after the payment of all debts secured in their (Sheffey and Bumgardner's) deed. So far, then, as I can solve this controversy, so ably argued *pro* and *con*, I report that the bank's lien under the deed of October 11th, 1875, is subordinate to the lien of the deed of November 20th, 1876.

The criticism upon the bank's deed, that its acknowledg-
71 ment is defective and that the notary's certificate is fatally defective, raises a question that I cannot find any decisions upon.

But taking the certificate and comparing it with the requirements of the statute, I do not think the statute complied with it.

It does not appear from the certificate when the notary took the acknowledgment in what State or in what county.

Registry statutes are explicit and mandatory, and much litigation has resulted from even seeming variances from the strict terms of the statute.

Prima facie the certificate was taken in the officer's own county,

and is correct; but whether this puts the burden of proof upon the bank or its assailants is material: *quære*, whether this certificate shall stand good until successfully assailed.

I submit this point to the court.

But the bank, evidently not trusting to the officer's certificate, attempts to fortify its deed by the attestation of witnesses. I am free to say that this attempt will not do. At the first recordation one witness, Martin, had signed, and he has never yet "attested" the deed before the recording officer, and at the second two, one of them being A. F. Mathews, who was the grantee therein. Chapter 73, section 2, requires that a deed shall, when attempted to be attested, be "proved by two witnesses as to him (the party signing) before such recorder."

72 The statute contemplates that to avoid the solemnity of a sworn officer's certificate and to remit the strict requirements of a notary's certificate two witnesses shall go before the clerk and "prove" the deed—*i. e.*, its execution, its delivery, and its acknowledgment. Here one witness fails to witness it or prove it before the clerk. A. F. Mathews, the other, who did not sign it for more than a year after, attempts it more than two years after its execution, and J. W. Mathews also. The one of these latter proves its "execution and delivery" and the other the "handwriting and acknowledgment." Neither witness acted contemporaneously with the grantor in signing it. One of the witnesses signs, the other does not.

As I understand the statute, both witnesses must "prove" the deed; their testimony must be alike—coexistent and identical. It won't do, as in this case done, to divide up the responsibility, the one swearing as to the "handwriting & acknowledgment," while the other swears only as to its "execution and delivery." These were all necessary to be proven alike by both witnesses; the proving cannot be thus patched up. But can A. F. Mathews attest it?

In deciding a case where a husband attested a deed to his own wife the court said: "By holding that an interested party may by his own oath aid in putting his deed on record, and thereby absolve himself from the duty of offering further proof when the execution of the deed is thereafter drawn in question, or that thereby he may impose on others the burden of disproving the execution, is to give such party an undue advantage, such as neither the plain letter or the spirit of the statute requires or sanctions."

73 Johnson and Wife *vs.* Slater, &c., 11 Grat., 324, &c.

It would seem to me that the attempt to attest to deed before the recorder of Greenbrier county fails. The common law prevails.

A. F. Mathews, the trustee in this deed, is a purchaser. He is the grantee and is incompetent to testify or to compel the others to bear the burden of disproving its execution.

But, aside from these technical criticisms upon the bank's deed, I find nothing in the case to warrant me in reporting other than that the bank's deed is subordinate in priority to the deed of November 20th, 1876, and its only claim is to be placed upon an equal footing with the other general creditors secured in said trust deed of November 20th, 1876.

5th Requirement.

Any other matter to be specifically stated deemed pertinent by the commissioner or required by any party; and the said commissioner shall report his proceedings under this decree to the next term of this court:

I know of no other matter deemed pertinent by me nor required by any party to be reported.

This report is therefore closed this 2nd day of November, 1886.

Respectfully submitted,

D. C. GALLAHER.

74 Costs of report: Printer's fee, $15.00.

——— ———, *Commissioner.*

The Bank of Lewisburg excepts to the foregoing report of Commissioner Gallaher because—

1st. Said commissioner does not report the debt in favor of and claimed by this exceptant in this suit as debts intended to be secured by the trust deed of November 21, 1876, as preferred debts, along with and a part of the "vendors' liens, judgments, or other paramount liens" mentioned and secured in said deed and as entitled to preference and priority in payment over the general non-preferred debts.

2nd. Said commissioner reports that the said debts of this exceptant are only entitled to share *pari passee* with the general non-preferred debts by him mentioned in the funds in the hands of Sheffey and Bumgardner, trustees, and funds in this suit under control of this court, and does not allow them the preference and priority of lien to which they are entitled.

3rd. Said commissioner reports that the debts of this exceptant were not paramount liens upon the lands of said Glendy or any of them conveyed by the deed of trust of Nov. 21, 1876, at the date of its execution, and that it was not, under its provisions, entitled to preference and priority as a preferred debt of the first class and to be paid in full before anything is paid upon the general debts of the second class secured by said deed.

75 4th. Said commissioner reports that said debts of this exceptant are not entitled to the preference claimed for them over the other debts secured by the said deed of trust of November 21, 1876, by reason of their having been secured by the older deed of trust of October 11th, 1875.

5th. Said commissioner reports that H. W. Sheffey, trustee in the deed of November 21st, 1876, did not have notice prior to the execution and recordation of said deed of the prior execution by Glendy of the older trust deed of October 11th, 1875.

6th. The commissioner wholly misapprehends the facts and misconceives the law in this case.

7th. Said commissioner does not confine himself to a statement of the conclusions reached upon the different matters and points re-

ferred to him by the order of recommittal, but indulges in a labored discussion of questions of law and fact, especially law, and a long argument in support of the claims and pretensions of the plaintiffs.

November 10th, 1886.

THE BANK OF LEWISBURG,
By ALEX. F. MATHEWS, *Its Att'y.*

76 And at another day, to wit, at a district court held for the district of West Virginia, at Charleston, in said district, on the 4th day of November, 1886.

SHEFFEY and BUMGARDNER
vs.
THE BANK OF LEWISBURG, &c. } In Chancery.

This day D. C. Gallaher, special comm'r, to whom this cause was recommitted, this day tendered his report, which is ordered to be filed.

Notice to Take Depositions.

To Hugh W. Sheffey and James M. Bumgardner, trustees, &c.:

Take notice that on the 27th day of April, A. D. 1885, between the hours of 6 o'clock a. m. and 6 o'clock p. m., at the law office of A. C. Branton, in the town of Staunton, Va., I will take the deposition of John Jones and others, to be read as evidence in my behalf in a certain suit in chancery now pending in the district court of the United States for the district of West Virginia, at Charleston, in which you are plaintiffs and I and others are defendants.

If from any cause the taking of said depositions shall not be commenced or completed on the day aforesaid the same shall be continued from day to day, at the same place and between the same hours, until the same shall be completed

THE BANK OF LEWISBURG,
By COUNSEL.

ALEX. F. MATHEWS, *Sol.*

Endorsement.

77 I acknowledge to have received a copy of this notice on 18th April, 1885; but I protest against any depositions being now taken under the same because—

1st. The cause was, after full argument, submitted for hearing and placed in the hands of the court for decision eleven (11) months previous to the date of this notice.

2nd. There is not now any issue of fact made by the present pleadings undetermined in said cause.

3rd. Depositions cannot be read under the rules of this court unless taken thirty days previous to the term.

20th April, 1885.

WM. A. QUARRIER,
For Defendants.

Depositions of John Jones and others taken in pursuance of the notice hereto annexed, before me, R. P. Bell, a notary public in and for the county of Augusta, in the State of Virginia, on Monday, the 27th day of April, 1885, between the hours of 6 o'clock a. m. and 6 o'clock p. m., at the law office of A. C. Braxton, in the town of Staunton, Va., to be read as evidence on behalf of the defendant in a certain suit in chancery pending in the district court of the United States for the district of West Virginia, at Charleston, in which Hugh W. Sheffey and James Bumgardner, trustees, are plaintiffs and The Bank of Lewisburg is defendant.

Present: Alex. F. Mathews, att'y for defendant, and James Bumgardner, Jr., for plaintiffs.

No witnesses appearing, the further taking of these depositions is postponed till to-morrow morning at 9.30 o'clock, at the same place.

78

RICH'D P. BELL, *N. P.*

APRIL 28TH, 1885.

The further taking of these depositions was resumed in pursuance of adjournment at the place and between the hours stated in the caption.

Present: Same parties as on yesterday, also H. W. Sheffey.

The plaintiffs, without waiving the exceptions endorsed on notice for taking depositions, desire to repeat the exceptions to the taking of any further testimony in this cause—

1st. Because the case has been submitted to the court for decision more than a year ago.

2nd. Because there is now no contested issue of fact in the cause.

3rd. Because by the rules of court depositions must be taken 30 days before the term.

JOHN M. KINNEY, a witness of lawful age, being first duly sworn, deposes and says as follows:

1st question by def'ts' counsel. Did you ever have any conversation with Hugh W. Sheffey, one of the plaintiffs in the above-named suit, or hear him say anything about the debt due the Bank of Lewisburg by R. J. Glendy and which is the subject of litigation in said suit in the said court, in which Hugh W. Sheffey and James Bumgardner are plaintiffs and The Bank of Lewisburg & *als.* are defendants?

Answer. I had several conversations with Judge Sheffey about the matter. I was the commissioner who settled the account in the case of Rhodes, adm'r, *vs.* Glendy and *als.*, in the circuit court of Augusta county, in which the debts against Glendy were audited and proved before me.

79

In making up the account of assets for distribution among the creditors I had occasion several times to confer with Judge Sheffey about the assets, as he was one of the trustees in the deed and I presumed he knew all about their condition.

2nd ques. by same. Did Judge Sheffey in these conversations or any of them or at any time express any opinion or apprehension as to the result of said suit of himself and Bumgardner, trustees, against the Bank of Lewisburg as to its said debt; and, if so, what did he say?

Answer. I remember on one occasion when I went there that I asked Judge Sheffey about the condition of the Stuart M'Clung farm which was conveyed in the deed. I wanted to know whether it had been sold, where the fund was, and all about the condition of it. He told me that the matter was in litigation in the court in West Virginia; that he could not say how the thing would eventuate, but from what he said I rather inferred that he thought the chances were rather against his recovery. I cannot give the whole conversation, but that was the impression left on me—that he considered the matter in rather a critical light. I know that my impression was so derived that in reply to several inquiries as to the probability of realizing anything further from the assets I stated to the parties this impression which I had derived from Judge Sheffey.

80 This question and answer are excepted to, the opinions, apprehensions, or doubts of the trustee as to the uncertain result of litigation then pending not being pertinent evidence to affect the rights of creditors under the trust deed.

3rd question by same. Did Judge Sheffey mention the grounds or reasons for such apprehension and opinion; if so, what was it?

Answer. He stated that there was some question about the notice which he had received about the deed, or which it was alleged that he had received about the deed, in favor of the Bank of Lewisburg for their Stuart McClung tract.

I had as well state here that I cannot discriminate between what Judge Sheffey said as to what the facts were as to that notice and what it was claimed the facts were by the other party.

4th question by same. Did Judge Sheffey say that he had notice or had heard of the deed from Glendy for the benefit of the Bank of Lewisburg before the execution and delivery of the deed from Glendy to himself and Bumgardner as trustees?

Answer. I have just explained in my previous answer that I cannot separate now, at this late date, what he stated as facts from what he stated were claimed to be facts by the other parties. I had a long conversation with him, and the impression I derived was that — Judge Sheffey knew about the matter himself would be a material question in the case.

I did not understand that he had then testified; rather that he had not done so.

81 Cross-examined by Judge SHEFFEY:

1st question. You have remarked (whether the statement has been written down, I do not remember) that your object in asking Judge Sheffey about the assets in West Virginia (the Stuart McClung assets) was in reference to whether there would be a further dividend

declared to the creditors of Glendy. Please state whether that was the case or not.

Answer. That was my object, to ascertain whether there would be any dividend from West Virginia, in addition to the proceeds of the Virginia lands.

2nd question. Was not this conversation after you had ascertained the dividends on the basis of the Virginia assets?

Answer. I cannot remember exactly at what stage of the proceedings the conversation occurred. I don't remember how many reports I made in the case. I think I made two dividend reports, and I think the conversation occurred between the making of the two, but cannot be positive.

3rd question. You have examined the reports in the case of Rhodes *vs.* Glendy. Please give the date of the report declaring dividends to the creditors and state whether there was any report of dividends prior to the date of the third report.

Answer. I have just examined the reports and find that there was no dividend prior to the last reports (No. 3) made by me which bears date August 31st, 1882.

82 The date of the next preceding report was March 21st, 1879. The suit was brought to February rules, 1877. 1st report was made October, 1877.

And further deponent sayeth naught.

JOHN M. KINNEY.

STATE OF VIRGINIA, *Augusta County,* } *To wit:*

I, Richard P. Bell, a notary public in and for county of Augusta, State of Virginia, do certify that the above deposition was taken, subscribed, and sworn to before me, at the place and times stated in the caption.

Given under my hand this 28th day of April, 1885.

RICHARD P. BELL,
Notary Public.

Notaries' fee	$1 50
Tax on seal & cl'k fee	1 37
	$2 87

Paid by Bank of Lewisburg.
R. P. B., *N. P.*

VIRGINIA, *Clerk's Office of Augusta County Court,* } *To wit:*

I, William A. Burnett, clerk of the county court for the county of Augusta, in the State of Virginia, the same being a court of record and having a clerk and seal, do hereby certify that Richard P. Bell, Esqr., before whom the foregoing deposition was taken and who has

signed his name to the certificate thereto annexed, was at the
83 time of so doing a notary public for said county of Augusta, duly commissioned and authorized, by the laws of the State of Virginia, to take acknowledgements, depositions, &c., and that all his official acts as such are entitled to full faith and credit, and that his signature thereto is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Staunton, Virginia, this 28th day
[SEAL.] of April, A. D. 1885.

WILLIAM A. BURNETT, *Clerk.*

I, Mark L. Spotts, a notary public in and for the county of Greenbrier and the State of West Virginia, have proceeded, on this 13th day of August, 1877, at the office of Mathews and Mathews, in the town of Lewisburg, county of Greenbrier and State of West Virginia, to take the deposition of Thomas H. Glendy and Alexander F. Mathews, to be read as evidence upon the trial of the cause pending in the district court of the United States for the district of West Virginia, at Charleston, Kanawha county, West Virginia, wherein H. W. Sheffey and James Bumgardner, Jr., are plaintiffs and The Bank of Lewisburg and others are defendants.

James Bumgardner, counsel for plaintiffs, present, and defendants' counsel present (A. C. Snyder & A. F. Mathews).

THOMAS H. GLENDY, a witness of lawful age, being first duly sworn, deposeth and sayeth as follows:

84 Question 1st for the def't, Bank of Lewisburg. Are you acquainted with the plaintiffs in this suit and the defendant, Robert J. Glendy, and what relation are you to the latter, if any?

Answer. I am acquainted with the plaintiffs and I am also acquainted with the defendant, Robert J. Glendy, who is my father.

Question 2nd by same. Take the trust deed dated November 20th, 1876, from R. J. Glendy and others to the plaintiffs, which is here shown you and a copy of which is filed as Exhibit "No. 1" with the plaintiffs' bill in this suit, and state whether you ever saw said deed before; if so, when and where, and who showed it to you.

Answer. I saw the original deed, of which this purports to be a copy, immediately after it was written and when it was being read to my mother by H. W. Sheffey, in the city of Staunton, at the residence of C. T. Cochran.

Question 3rd. Were any of the parties to said deed present at the time you saw the deed at Mr. C. T. Cochran's; if so, whom?

Answer. Robert J. Glendy, Mary J. Glendy, Hugh W. Sheffey, and John W. Glendy were all present at the time; James Bumgardner, Jr., was not present.

Question 4. State, if you know, who carried said deed and delivered it to the clerk of the county court of Greenbrier county for recordation.

Answer. I did.

85 5 Q. by same. Was that before or after you saw said deed at C. T. Cochran's; if after, how long after and who delivered it to you to bring to Greenbrier?

Answer. It was before I carried it to the clerk's office of Greenbrier county court; it was executed about 9 p. m. and on the next morning, about 3 or 4 o'clock, I started from Staunton to Lewisburg with the deed, and I think the deed was delivered to me by Mr. H. W. Sheffey.

6 Q. by same. State whether or not, at any time before you delivered said deed to the clerk of Greenbrier county for recordation, you had any knowledge of a deed having been executed by your father to secure the Bank of Lewisburg—a debt due from him to said bank.

Answer. I knew there was such trust deed.

7 Q. by same. State what you knew about said trust deed to the bank—that is, state the amount of the debt it secured, what land was conveyed in it, if you know, and all the information you had in regard to said trust deed.

Answer. I knew very little about it; I did not know the amount until after the deed was recorded; I knew it included the farm known as the M'Clung place.

8 Q. by same. From whom did you learn that such a deed had been executed to secure the bank and at what time?

Answer. I learned the fact of its execution from Robert J. Glendy and I think I learned that fact about the day before the deed to H. W. Sheffey *& als.* was executed.

9 Q. by same. When the deed to Sheffey and Bumgardner, trustees, was delivered to you to carry to Greenbrier for record
86 was there or was there not anything said about said deed to the bank; if so, what, and who was present at the time?

Answer. I do not remember that anything was said about it, and there was no one present, so far as I now recollect, except Robert J. Glendy, H. W. Sheffey, and myself.

10 Q. by same. What instructions were given you at the time said deed were delivered to you? Were you directed to go directly to Greenbrier and have it recorded at once, and were you cautioned as to any matters in relation thereto; if so, as to what?

Answer. My instructions were to have it recorded so soon as I reached Lewisburg, and I do not recollect that I was cautioned about it in any way.

11 Q. by same. Please state whether or not you know that H. W. Sheffey and James Bumgardner, Jr., or either of them, had any knowledge of the existence of said trust deed executed by your father to secure the Bank of Lewisburg at any time before you delivered said deed from your father to said Sheffey and Bumgardner to the clerk of the county court of Greenbrier county for recordation.

Answer. I do not know whether they knew anything about it or not; I gave them no information upon that subject and heard no one else do so.

12 Q. by same. Did you or not ever hear Judge Sheffey say anything to you or to your father that would indicate that he had such knowledge before the last-mentioned trust deed was recorded?

Answer. I did not.

87 13th by same. Do you recollect of having a conversation with J. Alexander Montgomery about three weeks since at the hotel in Lewisburg in relation to said deeds? If so, state as near as you can what was said by you on the subject at that time.

The above question is excepted to by the counsel of the plaintiffs. The conversations of the witness are of themselves irrelevant, and the defendant cannot introduce them to impeach or discredit their own witness.

JAMES BUMGARDNER,
Counsel for Plaintiffs.

14 Q. by same. Can you state that you did not say to Montgomery on the occasion referred to that Judge Sheffey did have knowledge of the existence of the deed to secure the Bank of Lewisburg before you delivered the deed to Sheffey and Bumgardner to the clerk of Greenbrier county for recordation?

Answer. I never told him any such thing.

And further this deponent saith not.

T. H. GLENDY.

ALEXANDER F. MATHEWS, a witness of lawful age, being duly sworn, deposeth and saith as follows:

1 Q. by B'k L'g, by counsel. State whether or not you have read the deed, a copy of which is filed as Exhibit "No. 1" of the plaintiffs' bill; if so, state whether or not you know of any property or choses in action belonging to R. J. Glendy or due to him not conveyed in said deed; state the kind and amount of same.

88

Answer. I have read said deed. At the time said deed was executed R. J. Glendy had a debt, in form of a judgment, against Jno. W. Warwick in Pocahontas county, which was reported and allowed in a chancery suit pending in said county against said Warwick, to satisfy which and other debts his, the said Warwick's, lands have since been sold. This debt amounted then to some $2,000.00 to $2,500.00. Said Glendy also had judgment liens against Samuel C. Ludington in Greenbrier county, to satisfy which lands have been sold. As to the amount of these debts, I cannot be accurate, but I am sure they were not less than $2,000.00.

2 Q. by same. Are you acquainted with the defendant, R. J. Glendy; if so, do you know where he now resides, and where he has resided for the past five years? State where.

Answer. I know R. J. Glendy. He now resides and for the past five years has resided in the State of Virginia, and, I believe, in Bath county.

And further this deponent saith not.

ALEX'R F. MATHEWS.

I, Mark L. Spotts, notary public in and for the county and State aforesaid, do certify that the foregoing depositions of Thomas H.

Glendy and Alex. F. Mathews were taken, sworn to, and subscribed before me at the time and place mentioned in the caption.

89 Given under my hand this 13th day of August, 1877.

MARK L. SPOTTS,
Notary Public, Greenbrier Co., West Va.

Notary's fees, 2 h's..... $1 50
Postage..... 06

90 To Hugh W. Sheffey and James M. Bumgardner, trustees, &c.:

Take notice that on the 30th day of April, 1885, between the hours of 6 o'clock a. m. and 6 o'clock p. m., at the law office of Alex. F. Mathews, in the town of Lewisburg, W. Va., I will take the deposition of John Smith and others to be read as evidence in my behalf in a certain suit in chancery now pending in the district court of the United States for the district of West Virginia, at Charleston, in which you are plaintiffs and I and others are defendants.

If from any cause the taking of said depositions shall not be commenced or completed on the day aforesaid the same shall be continued from day to day, at the same place and between the same hours, until the same shall be completed.

THE BANK OF LEWISBURG,
By COUNSEL.

ALEX. F. MATHEWS, *Sol.*

I acknowledge to have received a copy of this notice on 18th April, 1885; but I protest against any depositions being now taken under the same because—

1st. The cause was, after full argument, submitted for hearing and placed in the hands of the court for decision eleven (11) months previous to the date of this notice.

2nd. There is not now any issue of fact made by the pleadings undetermined in said cause.

3d. Depositions cannot be read under the rules unless taken thirty days previous to the first day of the term.

WM. A. QUARRIER,
For Defendants.

1885, 20 April.

91 Deposition of John Smith and others, taken before me, Henry Gilmer, this 30th day of April, 1885, at the law office of Alex. F. Mathews, in the town of Lewisburg, W. Va., to be read on behalf of the Bank of Lewisburg in a certain suit in chancery now pending in the district court of the United States for the
92 district of West Virginia, at Charleston, in which suit Hugh W. Sheffey and James Bumgardner, trustees, &c., are plaintiffs and the said Bank of Lewisburg is defendant, pursuant to the notice hereto annexed.

Present: The Bank of Lewisburg, by counsel, and Judge H. W. Sheffey.

The plaintiffs, without waiving any objections endorsed on the original notices, insist that it is too late to take testimony now:

First. Because the case had been submitted to the court for decision more than a year ago.

Second. Because there is now no contested issue of fact in the case.

Third. Because by the rules of this court depositions must be taken 30 days before the term.

A. C. SNYDER, having been sworn, deposes and says:

1st question by the Bank of Lewisburg. Did you ever have any conversation with Hugh W. Sheffey with reference to the trust deed in the bill and proceedings in said cause mentioned, executed to him and James Bumgardner, trustees, by R. J. Glendy, as to the circumstances attending its execution, and what was said at the time by said Glendy and Sheffey; if so, when and where did said conversation take place and what was said to you by said Sheffey? State the whole matter fully.

Answer. Soon after this suit was brought I went to Staun-
93 ton to make inquiries about the suit. I went to the office of Messrs. Sheffey and Bumgardner in Staunton; found Mr. Bumgardner there. He told me that Mr. Sheffey was at his private office at his house in the city. I then went to see Judge Sheffey and had a conversation with him about the deed referred to in the question. I referred to the debt of the Bank of Lewisburg, and Judge Sheffey stated that he had no notice of that debt at the time the trust deed was executed, but that while they were preparing the deed and ascertaining the liabilities of Glendy, Mr. Glendy was about to state something in reference to some particular debt about which he felt considerable anxiety, and before he mentioned the debt Judge Sheffey told me that he said to Glendy that if he had anything to say in reference to any claim that he was not the man to whom to mention it, as he would be the trustee in the deed, or if he wanted him to be the trustee, I do not remember now which; that then Glendy made no further statement on that subject. I do not now recollect all the conversation or the particular manner, the subject about which I have stated arose.

2nd quest. by same. Did Judge Sheffey say whether—before he stopped him, as stated—Glendy had gone so far as to say to what debt he alluded or to say or indicate in any way that it was a lien on any of his property?

Answer. I do not recollect now what was said particularly, except
the impression that was left on my mind, and that was that
94 the Lewisburg Bank debt was the debt referred to, but I do not remember any words to base that impression on.

Cross-examined:

Without waiving any objections to the admissibility of this deposition for any purpose, plaintiffs ask the following questions:

1st question by plaintiff. Were you acting as counsel for the Bank of Lewisburg at the time referred to; if so, how long did you so continue?

Answer. I do not know whether I was employed as counsel at that time or at any subsequent time, but I was an officer of the bank and acting for the bank, and subsequently and perhaps at that time I was acting for the bank as counsel and so continued till April, 1882. I was also a stockholder.

And further the deponent saith not.

A. C. SNYDER.

STATE OF WEST VIRGINIA, *County of Greenbrier*, } *To wit:*

I, Henry Gilmer, a notary public for county and State aforesaid, do certify that the foregoing deposition of A. C. Snyder was taken before me, in the town of Lewisburg, at the office of Alex. F. Mathews, and that the foregoing are true answers as given by said Snyder. This deposition is taken subject to the exceptions endorsed by the plaintiff on the notice and pursuant to the notice and caption hereto annexed.

Given under my hand this 30th day of April, 1885.

HENRY GILMER,
Notary Public.

95 STAUNTON, *November 3rd*, 1877.

A. F. Mathews, Esq'r.

DEAR SIR: In accordance with your request I furnish separate statements as to the matters connected with the execution of the trust deed by Robert J. Glendy and wife to Captain Bumgardner and myself as trustees, each statement to be read as evidence in the injunction suit instituted by Glendy's Trustees *vs.* The Bank of Lewisburg and pending in the circuit court of the United States for West Virginia, holden at Charleston, but to be subject to such exceptions as to relevancy and pertinency of the matters stated therein as the counsel of the parties may take thereto.

Statement marked "A" is as to matters called for by yourself, as counsel for the Bank of Lewisburg, and statement marked "B," on a separate sheet, attached hereto, is as to matters deemed by the plaintiffs to be competent evidence in the cause, either upon the issue made up or, if need be, upon an application for leave to amend the bill in order to make the trust deed conform to the true intent and meaning of the parties thereto—that is, to reform the deed and correct any mistake therein.

96 *Statement "A."*

I am requested by the counsel of the Bank of Lewisburg to state, when I first learned of the existence of the deed to secure the Bank of Lewisburg in its answer in the above-entitled cause mentioned and described—to state whether it was before the execution and de-

livery of the trust deed to James Bumgardner, Jr., and myself as trustees, or, if after the execution and delivery of that deed, to state whether it was before its recordation.

In reply to this request, I state that, according to my best recollection of the facts, I first heard of the matter of the deed of trust to secure the Bank of Lewisburg and of its existence after the exe-, cution and delivery of the trust deed of R. J. Glendy and wife to Captain Bumgardner and myself as trustees, and before the recordation of the last-named deed, under the circumstances which I proceed to detail as the source of my knowledge as to the matter referred to in the question. The trust deed from Glendy and wife to myself and my cotrustee was, after many conversations with Mr. Glendy and much investigation into the condition of his affairs and the amount of his indebtedness, prepared by myself at my house, in the city of Staunton. Owing to causes not necessary to state the deed was not finally completed for execution until perhaps nine o'clock at night, and, owing to the fact that Mrs. Glendy was at the residence of Mr. C. T. Cochran in this city, the trustees, Mr. Glendy, and the notary repaired to Mr. Cochran's, and the deed was there duly executed, acknowledged before the notary, and delivered to me ready for
97 recordation.

After I had received the deed so executed and delivered I placed it in the hands of Mr. Thomas Glendy to be carried by him to the proper offices for recordation, he having undertaken to have the deed recorded.

After this I saw neither Thomas Glendy nor the deed until it was duly recorded. From Mr. Cochran's house Mr. Ro. J. Glendy went with me to my house and remained there conversing about his affairs for some time. In the course of this conversation he referred to the debt due to the Bank of Lewisburg, the amount of which, on a list of his estimated debts, he had previously given me, and as my knowledge of the existence of the deed to secure the debt of the Bank of Lewisburg was derived from the conversation with Mr. Glendy I deemed it to be proper to state, according to my recollection, all that was said by him. He stated, after referring to this debt, that formerly a Mr. Clark, of Greenbrier county (I believe), had been his endorser on paper given by him for loans obtained at the Bank of Lewisburg; that perhaps a year or more previously (the endorsement of Mr. Clark being no longer available) he had executed a deed of trust on the McClung farm to indemnify the bank for advances to him; that that deed was at the time it was given not intended to be recorded at once, but was to be held by the officers of the bank and to be recorded only when the bank deemed its interests required it.

He said further that he thought he had done right or felt justified in what he had done in placing the Bank of Lewisburg on the
98 same footing as the banks in Staunton, Mr. M. H. Effinger, and other creditors.

I think I have stated substantially what Mr. Glendy said in connection with the debt due to the Bank of Lewisburg, and according to my recollection, as before stated, this information was received by me after I had parted with Mr. Thomas Glendy, but on

the same night and before it was practicable to have had the deed recorded.

November 3rd, 1877.

HUGH W. SHEFFEY.

Statement "B."

GLENDY'S TRUSTEES *vs.* BANK OF LEWISBURG.

I submit on behalf of the plaintiffs in the case of Glendy's Trustees *vs.* The Bank of Lewisburg, pending in the circuit court of the United States for West Virginia, holden at Charleston, the following statement: That as scrivener and counsel for Ro. J. Glendy I prepared the trust deed executed by said Glendy and wife to myself and Captain Bumgardner as trustees; that I prepared said deed after full conference with said Glendy and after hearing from him his wishes, purposes, and intentions in respect to the proposed deed; that at my request he made out a list of his debts as far as he could remember them at the time; that that list set forth the debt of the Bank of Lewisburg as amounting to $15,000; also a debt to the Augusta National Bank of Staunton, amounting to $13,500.00; a debt for which Mr. M. Harvey Effinger had bound himself for Mr. Glendy, amounting to about $17,000; a debt to the National
99 Bank of Staunton, the exact amount of which I do not remember, and other debts—an aggregate of $80,000.00 to $90,000.00.

This list of debts I have lost or mislaid, and although I have searched diligently for it I have not been able to find it.

My purpose at first was to specify the debts in the deed, but, being of opinion that owing to his business relations with his partner, D. V. Ruckman, and other reasons Mr. Glendy could not make out an accurate statement of his debts, I adopted the plan apparent on the face of the deed.

Mr. Glendy also furnished me with a schedule of the properties which he proposed to convey in order to secure his debts, a list of part of which he had given me, as before stated, and among these properties was the Stuart McClung farm, lying in the county of Greenbrier, in West Virginia, which it was well known in this community Mr. Glendy owned, and the value of which was estimated in said list at from $25,000.00 to $30,000.00, as part of the means of providing for and securing his debts.

The estimated value of the property fell short of the estimated amount of his debts; exactly how much I do not remember. I will here add, however, that it has come to my knowledge since the execution of said deed that the amount of Mr. Glendy's debts considerably exceeds that estimated by him at the time.

Mr. Glendy's instructions to me as scrivener and as his
100 counsel in preparing the deed (for not until the deed was prepared or nearly completed did he suggest to me his desire that I should act as one of the trustees) were these: That his creditors should stand on the same footing; that the property conveyed should be sold as directed in the deed, and that the proceeds

of the sale of said property should be distributed ratably among his creditors, the means of securing the debts being, as I was instructed, the proceeds of the sale of the properties conveyed, including the McClung farm, as an unencumbered property, and the debts to be secured, including that of the Bank of Lewisburg, being those set forth in the list furnished and all his other debts, any debt for which he was bound as surety to be chargeable on the fund, only as might be equitable—that is, only for such amounts as could not be realized out of his principals.

Now, if there be any ambiguity in the words used in the deed, declaring how the proceeds of the sale should be disposed of, if these words are at all susceptible of the construction that an unrecorded writing executed by Glendy, of which the trustees had no notice, should stand good, and, in particular, that the unrecorded trust deed in favor of the Bank of Lewisburg should be protected by the trust deed to myself and my cotrustee, and that the amount to be secured to said Bank of Lewisburg by said unrecorded deed was, in any event, to be paid out of the proceeds of sale by us, then I say the words capable (if capable) of such construction does not express the intention of the grantor, as set forth in his instructions, and that the mistake was that of myself as scrivener; that in
101 obedience to the instructions and expressed intention of the grantor I designed to use words and thought I had used words to express this purpose—that is, to direct the trustees, out of the proceeds of sale, to pay, in the first place, all charges and claims on the property conveyed which in law should be paramount to the deed itself, as a legal security for the general creditors of the grantor Glendy; in fact, merely to express what would have been the legal duty of the trustees had nothing been said on the subject at all.

If the language used means more than this it was by mistake of myself, as scrivener, and conveys a meaning not intended to be expressed by the grantor's instructions.

I am requested by the counsel for the Bank of Lewisburg as upon to say "whether Mr. Glendy did not depart from his virtuous intentions, that all his creditors should share ratably and equally, by giving notice to his son-in-law, Mr. Moon, a wealthy gentleman, of his deed to you and B. in time for Moon to put his pocket deed on record ahead of your deed, and whether, in fact, Moon did not do so."

In reply I say that my statement in respect to the matter of equality among his creditors had reference to Mr. Glendy's instructions to myself as scrivener; that, as a matter of fact, I did not see Mr. Moon at all on the occasion referred to, and I have no personal knowledge of any notice given by Mr. Glendy to Mr. Moon of the trust deed to myself and Captain B., as I am informed, and I am satisfied it is true that Mr. Moon did put on record in Bath a deed on a portion of the property conveyed before the recordation
102 of the deed to Glendy's creditors. The date of this deed I do not know, as I never saw it or a copy of it.

HUGH W. SHEFFEY.

So much of the foregoing statement of Judge Sheffey, the tendency and object of which is to vary by adding to or taking from the deed of trust No. 2, filed with the plaintiff bill, the intrinsic meaning thereof is excepted to as being wholly inadmissible. The deed must speak for itself, there being no latent ambiguity in the deed which needs parol explanation.

November 8th, 1877.

A. C. SNYDER,
S. PRICE,
For Def't.

103 And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, in said district, on the 30th day of November, 1887.

SHEFFEY and BUMGARDNER, Trustees, Comp'ts,
vs.
BANK OF LEWISBURG *et als.*, D'f'ts. } In Equity.

This cause came on this day to be heard and was argued by counsel; and thereupon for reasons contained in a written opinion delivered by this court, which is in the words and figures following:

104 In the District Court of the United States for the District of West Virginia.

SHEFFEY and BUMGARDNER
vs.
THE BANK OF LEWISBURG and Others. } In Equity.

JACKSON, *Judge:*

On the 11th day of October, 1875, Robert J. Glendy executed a deed of trust to the Bank of Lewisburg on a tract of land in Greenbrier county, in this State, to secure to the bank a loan it had made to him of $15,000.00.

The bank held this deed and did not place it on record until after another trust deed was executed by Glendy to the complainants in this cause on the 20th day of November, 1876, covering the same land.

This deed was admitted to record under the registry laws of the State on the 21st day of November, 1876, at 11 o'clock a. m. of that day, whilst the deed of The Bank of Lewisburg, the defendant in this cause, was not recorded until some five hours after on the same day.

In April, 1877, the trustee, under the deed to the bank, advertised for sale the lands described in it, but before the sale took place the complainants filed their bill in this case, claiming that they had a prior lien upon the land and applied to this court for an injunction to restrain the trustee, under that deed, from making sale until the court could determine the respective rights of the parties under the two trust deeds.

105 The judge of this court, on the 3rd day of May, 1877, passed an order, at chambers, to restrain the trustee, Mathews, from selling the property described in the bill until the further order of the court.

On the 15th day of November, 1877, the bank filed its answer, alleging, first, that Sheffey and Bumgardner, trustees under the second deed of trust, had notice of the bank's deed before the execution of the deed to them; second, that Sheffey and Bumgardner had such notice before the recordation of the deed; third, that by the terms of the deed to Sheffey and Bumgardner the debt due the bank had priority, and, fourth, that the deed to Sheffey and Bumgardner was void on its face.

Nothing further was done in this case until the May term, 1878, when it appears that on the 4th day of May the bank tendered an amended and supplemental answer, setting up the fact that at the time that Glendy executed the two deeds of trust heretofore referred to he was not vested with the legal title to the lands upon which he had given the two deeds of trust, and that since the filing of the original answer he had received and recorded his deeds and had become vested with the legal title, and that since he had become vested with the legal title the bank had obtained judgment at law against him, and that under the provisions of the Code of West Virginia it had obtained priority over the deed of trust to Sheffey and Bumgardner.

The filing of this answer was objected to by the complainants, and the objection was sustained, the court holding that the mat-
106 ters set up in it, if true, did not affect the questions at issue in this cause, and for this reason the court perpetuated the injunction, decreed a sale of the lands, and ordered the proceeds to be distributed under the provisions of the Sheffey and Bumgardner deed.

At the next term of the court, on the 2nd day of August, 1878, the bank tendered a petition to rehear so much of this decree as refused to allow the supplemental answer to be filed, and the first question that presents itself for the consideration of the court is whether this decree was a final or interlocutory order in this cause.

It appears that the consideration of the questions presented by this petition was postponed until the November term of this court, in 1885, when the court passed upon them and entered a decree which vacated and set aside the decree of the 4th day of May, 1878.

It is now insisted that the court could not properly make the order vacating that decree for the reason that it was a final decree, disposing of all the questions presented by the pleadings in this cause.

The bill filed was mainly for the purpose of settling conflicting rights under two deeds of trust given by the defendant Glendy upon a valuable farm in Greenbrier county, one to the plaintiffs in this cause and the other to the defendant, The Bank of Lewisburg.

The deed to the bank was first executed and delivered, but the deed to the plaintiffs was first duly recorded under the registry laws of the State.

107 The bill made the Bank of Lewisburg, Alexander F. Mathews, and Robert J. Glendy defendants.

The vital question presented by the pleadings was, which of the two deeds secured the first lien upon the property? For this purpose it was only necessary to have the bank and the trustee before the court, as the plaintiffs were only contesting the right of the bank to assert a prior lien under its trust.

When this question was disposed of all the court had to do was to direct the sale of the property and distribute the proceeds amongst the creditors secured by the trust, which was ascertained to be the first lien upon the land conveyed, and if there was any balance, after satisfying the creditors secured in that trust, apply such balance to the satisfaction of the debts secured in the second trust.

This question being settled, the merits of the controversy as presented by the pleadings were at an end.

The decree of May 4th, 1878, directed a sale of the land in controversy, distributed the proceeds arising from the sale, and perpetuated the injunction inhibiting the bank from selling under its trust deed.

It is obvious that this decree determined the rights of the parties and was, in effect, a decree of foreclosure of mortgaged premises, leaving nothing to be done except to execute its provisions.

Such a decree has always been held by the legal tribunals to be a final decree. That the defendant bank so regarded it is evident from the order it obtained from the court on the 2nd day of

108 August, 1878, tendering "its petition for a rehearing of the order made in the cause at the term before."

The petition did not seek to open the decree only so far as the court had refused the bank permission to file what it termed its amended and supplemental answer, which presented the fact that at the time that Glendy executed the two trust deeds referred to he was not vested with the legal title to the lands conveyed, and that the bank had obtained judgment against Glendy and had the same docketed after he acquired the legal title.

The subject-matter of this petition was duly considered at the time, and we see no reason now to change the views we then entertained, and only refer to it to show the conclusive character of the decree as admitted by the petition filed by the bank.

If, then, this decree is final, as we hold it to be, it is not a subject of review by the court which passed it after the term at which it was entered, the time having expired within which, under equity rule 88, a rehearing could be had. That rule expressly declared that "No rehearing shall be granted after the terms at which the final decree of the court shall have been entered and recorded."

The application of this rule has been frequently the subject of consideration by the Supreme Court, and in the case of Roemer *vs.* Simon, 95 U. S., it held that court which rendered the decree "cannot grant a rehearing after the term at which the final decree was rendered."

109 It is true that this decree has been vacated for the reason given by the court at that time that the beneficiaries or

cestuis que trust were not before the court. Subsequent reflection has not only induced me to change my views upon this question, but it leads me to the conclusion that if there is a want of proper parties before the court it is an error which can be reached only by an appeal.

It follows, therefore, that the decree of May 4th, 1878, is unaffected by the order entered in August, 1878, at the following term of the court.

I might well rest this case upon this ground, but there is another question which I will briefly consider, for the reason that I regard it as conclusive of the case, and that is whether the plaintiffs were purchasers with notice.

A strong effort has been made to show that the trustee, Sheffey, had notice of the existence of the trust deed to the bank.

Notice must either be actual or constructive. It is not contended that he had constructive notice, and, therefore, if he had any it must have been actual.

There is no direct proof of notice, but there is an attempt to show such circumstances as amount to notice.

Notice of this character must be clearly proved. That no one proves it does not seem to admit of a doubt. It is not sufficient to say that there is a web of circumstances that surround the plaintiff, Sheffey, in this transaction which tend to fix a strong
110 suspicion of notice upon him. If this were true, then, the guilt of fraud would attach to him, which would be unjust, founded on such testimony.

It is well settled that "to affect a purchaser for value of land with notice of an unrecorded deed of trust the evidence must be sufficietn to prove him guilty of fraud."

There is no evidence in the record that tends to fix a fraud upon Sheffey. He is placed on the witness stand and denies any knowledge of the existence of the bank deed until after the execution and delivery of the deed by Glendy to the plaintiffs.

It is true that the evidence of McKinney and Snyder tend to fix upon Sheffey a suspicion of notice of the prior existence of the deed of the bank, but that is not sufficient. Mere suspicion, though strong, proves nothing, and certainly is not sufficient to overthrow the positive evidence of a witness placed on the stand by the defendants, who present him to the court as worthy of credit.

Such was the high character of the witness that the defendants waived his sworn testimony in the first instance and accepted his simple statement in writing as true.

It is true that after he was placed on the stand and his testimony taken pursuant to law; but the court fails to perceive that there is any material difference between his testimony under oath and his statement made when not under oath.

It follows that there is want of sufficient notice to affect the purchaser who claims under the second deed of trust; and, inas-
111 much as the second deed was first recorded, the statute gives it priority in the absence of actual notice to the trustees before its execution.

The plaintiffs in this cause claim under the trust that was first recorded, and the burden of proof is on the defendants to establish notice to affect their rights under that trust.

This they have failed to do, and for this reason as well as one first assigned the court is of opinion that the decree heretofore passed on the 4th day of May, 1878, should stand as its judgment.

It is claimed, however, that the debt due the bank was intended by Glendy to be secured by the trust deed of November 20th, 1876, as a preferred debt along with the vendors' liens, judgments, and other paramount liens mentioned and secured in said deed and entitled to preference over the general creditors.

Clearly this debt is not embraced by either of the two first classes referred to. If it is secured under this trust it must be under the class named as "paramount liens."

What, then, is a paramount lien? It is a lien that must exist at the time of the execution of the deed.

That it did not exist so as to affect either purchasers or creditors without notice cannot be controverted.

The deed to the bank, unrecorded without notice, was only good as between it & Glendy.

It was neither prior in point of time nor superior in point of dignity to any of the debts secured by the trust deed to plaintiffs.

112 To make the bank debt a paramount lien under the deed of trust of November 20th, 1876, it must have been a valid lien at the date of its execution.

This deed did not create paramount liens; it only recognized existing liens made paramount by law.

This was clearly the purpose of the grantor, for he recites in his deed that "he owed many and large debts which he desired to secure, and at the same time to prevent any of his creditors from getting priorities over others and to place his creditors on a footing of entire equality."

It is obvious that the grantor Glendy did not intend by his deed to create a preference amongst his creditors. He intended, so far as he could, to place them in the position the law gave them. He could not have forgotten the bank debt, and if he desired to give it a preference he could have easily done so.

He did not do it, but left it to its legal fate. It was a secret trust, and clearly void as to creditors and purchasers for value without notice.

That the plaintiffs were purchasers for value without notice we cannot doubt. The question of notice we have before disposed of, and it is now the settled law that a trustee is a "*bona fide*" purchaser until the contrary is shown.

Such we hold the plaintiffs to be at the time the deed was made to them.

Other questions have been presented and ably discussed, but it is unnecessary to consider them, as the points ruled dispose of the case.

113 It follows that the decree entered on May 4th, 1878, stands

unaffected, and that the exceptions to the master's amended or second report are overruled.

114 It is adjudged, ordered, and decreed as follows:

That the petition heretofore tendered in this cause on 2nd of August, 1878, to rehear a portion of the decree entered herein on the 4th day of May, 1878, be, and the same is, rejected, and is not allowed to be filed.

That the exceptions taken by the defendant, The Bank of Lewisburg, to and endorsed on the report of Commissioner D. C. Gallaher, filed on the 4th day of November, 1886, each and every of them, be, and the same are, hereby overruled, and that said report be ratified, confirmed, and approved.

And that the register of this court do immediately pay over to the complainants, trustees as aforesaid, for distribution, the sum of money, with its accrued interest, which he was heretofore directed to receive from said Bank of Lewisburg and which was originally deposited with said bank to the credit of this suit by Trustees and Commissioners Sheffey, Bumgardner, and Mathews on account of the sale of the property hereinbefore decreed to be sold by them, being the sum of eighteen thousand four hundred and sixty-six dollars and forty-nine cents, with legal interest thereon from this day.

And the said complainants do recover from the said defendant their costs by them expended in the prosecution of this suit.

And there is allowed William A. Quarrier, the solicitor of the complainants, the sum of one thousand dollars for his services in prosecuting this suit, to be paid to the said solicitor by the

115 trustees, Sheffey and Bumgardner, out of the funds here decreed them, but said sum is not to be taxed against the defendants.

And the said trustees, Sheffey and Bumgardner, do distribute the residue of said fund by paying first to the Bank of Lewisburg, who has as yet received no dividends from the funds heretofore distributed by said trustees to the trust creditors, a sum sufficient to make the dividends to said bank equal to the dividends received by the other trust creditors having relation to the respective trust claims as secured in the deed from Glendy to the complainant, and then the said trustees shall pay the residue of said fund to the creditors of Glendy, secured in the deed of trust from said Glendy to said trustees, dated 20th day of November, 1876, and exhibited with the bill in *pro rata* proportion to the claims secured to said creditors, as ascertained and reported by Com'r Gallaher, as of the 1st day of November, 1883.

The names of said creditors and the amounts due them on that day are as follows:

116	Joseph H. Lantz	$688 30
	Andrew A. Crawford	250 12
John & Samuel Given		642 40
Rob't S. Cook		495 95
B. F. Hailman, guard'n Ella Summers		1,013 34
Do.	do. Martha V. Summers	982 16
Do.	do. Committee Eliza Kerr	410 14

Joseph H. Lantz	320 18
John Lightner's ex'r	1,210 52
David Fultz, subrogee	488 56
John Lightner's ex'rs	Taxed costs.
John Wilson's adm'r	179 12
James Bumgardner, rec'r	1,798 95
Joel Armentrout	1,958 80
James Gardner's adm'r, Rebecca Sterrell	1,491 82
V. H. Rodes	3,177 56
Rebecca J. Sterrell	296 93

1.

Nat. Val. Bank of Staunton	11,132 91
G. W. M'Clintic	2,116 83
M. H. Effinger	9,297 26
Wm. Ramsey	1,371 20
S. W. Miller	327 45
Chas. Levisay	1,995 83
A. W. Mathews	308 30
Geo. Robinson	340 60
Jordan & Miller	1,432 25
Allison & Addison	145 56
Glendy & Trallinger	6,211 03
Geo. H. Smith	869 50
Jas. D. Pownall	3,220 07
B. A. Given	204 30
A. D. S. Beck	1,312 37
Jas. A. M'Clung	4,605 65
Alex. Knight (two debts)	5,956 34
Edward Bulger	249 71
Jno. W. Alby	290 07
A. B. Kincaid	21 83
A. F. Mathews	554 54
David Wiley	2,945 20
David Given	859 63
Lewis Meyers	6,147 12
Sheffey & Bumgardner	166 18
Heirs of Samuel Blackburn	4,162 60
B. F. Renick	4,233 20
Augusta Nat. Bank of Staunton	17,093 50
Arbogast, Levi	583 46
Arbogast, George	554 55
Arbogast, Benjamin	1,739 80
Bevenage, Wesley	39 55

2.

	Bird, John W	198 50
	Bird, Peter	172 64
	Bralton, J. F. & Geo. W.	3,369 35
117	Cooper, Levi & S. P.	1,601 48
	Cooper, Levi	93 43

Cooper, E. B.	392 49
Campbell, D. H. (two debts)	482 50
Campbell, Susan	99 00
Campbell, J. Broun	144 60
Colon, George	65 90
Dever, Jasper	67 30
Dever, Frances	761 27
Dever, Hugh	789 90
Effinger, M. Harvey	13,172 25
Eagle, S. C.	2,098 05
Farmers' & Merch'ts' Nat. Bank of Baltimore	19,547 40
Gilmore, Alex.	1,036 16
Gum, Amos	134 90
Gum, John E.	861 90
Gillison, Samuel L.	1,558 73
Gillison, William	890 37
Gillison, John L.	812 71
Gwin, John	308 61
Gwin, B. A.	321 77
Gwin, David	1,294 66
Gay, John	1,391 36
Hooper, Samuel H.	9,662 07
Hevener, Geo. W.	2,780 85
Hevener, Wm.	2,138 33
Hevener, Uriah	2,641 50
Hansel, B. & John H.	1,119 73
Kincaid, Peter H.	306 05

3.

Lightner, Jacob	108 85
Lightner, Samuel	65 90
Lockridge, Robert	781 65
Moffett, Rob't H.	2,218 91
McDaniel, William	347 50
Moore, Isaac	2,837 98
McLoughlin, Geo. D.	105 25
Nat. Valley Bank, Staunton	23,060 85
Patterson, S. P.	131 85
Pownall, Joseph D.	8,219 96
Ruckman, John W.	1,266 22
Rider, Geo. W.	441 81
Siron, Jonathan	837 72
Seibert, Henry & Son	1,773 47
Shumate, Jacob L.	44 68
Stephenson, Adam	1,962 63
Sitlington, Robert	1,875 00
Stephenson, L. H., assignee	331 70
Stephenson, L. H., com'r	3,282 35
Tomlinson, H. M.	131 85
Trimble, John	65 90
Weiser, Carl & Son	12,950 45

	Wade, James W.	258 19
118	Wallou, John S.	34 20
	Wade, Anson O.	1,387 18
	Wiley, M. F.	1,769 21
	Wade, Stephen S.	196 90
	Wiley, James C.	124 26
	Nat. Valley Bank, Staunton (Nelson)	9,792 82
	Nat. Valley Bank, Staunton (Warwick)	5,462 40
	James W. Seig	2,370 39
	Robinson, Maria	42 17
	Summers, Julia A.	5,435 00

4.

Bank of Lewisburg	31,350 17

And the said trustees do make report of their proceeding to this court.

And thereupon, on the petition of the Bank of Lewisburg, an appeal and supersedeas is awarded to it from this decree to the Supreme Court of the United States upon the petitioner, or some one for it, executing bond, with approved security, in the penalty of $40,000.00 conditioned according to law.

And thereupon Alexander F. Mathews and A. C. Snyder executed said bond in the penalty aforesaid and with the conditions aforesaid, payable to the complainants.

And A. C. Snyder and Alexander F. Mathews also executed a second bond, payable to the clerk of said supreme court, conditioned for the payment of the costs of this appeal, in the penalty of $200.00, and each of said bonds having been approved by this court are ordered to be filed.

And it is ordered that said sum of $18,466.49, the subject of controversy in this cause, be loaned out by the register pending the hearing of this cause in the Supreme Court upon good security.

J. J. JACKSON, *Judge.*

November 30, '87.

119 Know all men by these presents that we, A. C. Snyder, a responsible person, for and on behalf of the Bank of Lewisburg, and Alex. F. Mathews, his security, are held and firmly bound unto Hugh W. Sheffey and James H. Bumgardner, trustees, in the just and full sum of forty thousand ($40,000.00) dollars, to be paid to the said Hugh W. Sheffey and James H. Bumgardner, trustees, &c., their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 30th day of November, 1887.

Whereas lately, at a district court of the United States for the district of West Virginia, sitting at Charleston, in a suit depending in said court between the said Hugh W. Sheffey and James H. Bumgardner, trustees, plaintiffs, and The Bank of Lewis[illegible] and others, defendants, a decree was rendered against the said Bank of Lewisburg,

and the said Bank of Lewisburg having obtained an appeal from said decree and filed a copy thereof in the clerk's office of the said court to reverse the said decree in aforesaid suit, and a citation, directed to said Hugh W. Sheffey and James H. Bumgardner, citing — admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the ——:

Now, the condition of the above obligation is such that if the said Bank of Lewisburg shall prosecute said appeal to effect and answer all damages and costs if it fails to make its plea good, then
120 the above obligation to be void; else to remain in full effect and virtue.

A. C. SNYDER. [SEAL.]
ALEX. F. MATHEWS. [SEAL.]

Signed and delivered in the presence of—
—— ——,

Approved:
J. J. JACKSON, *Judge.*

121 Know all men by these presents that we, A. C. Snyder and Alex. F. Mathews, of Lewisburg, in the county of Greenbrier and State of West Virginia, are held and firmly bound unto James H. McKinney, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars, to be paid to the said James H. McKinney, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 30th day of November, 1887.

Whereas lately, at a district court of the United States for the district of West Virginia, sitting at Charleston, in a suit depending in said court between Hugh W. Sheffey and James H. Bumgardner, trustees, &c., plaintiffs, and The Bank of Lewisburg and others, defendants, a decree was rendered against the said Bank of Lewisburg, and the said Bank of Lewisburg having obtained an appeal to remove the said cause to the Supreme Court of the United States and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the decree in the aforesaid suit:

Now, the condition of the above obligation is such that if the said obligors shall well and truly pay or cause to be paid to the said James H. McKinney, his heirs, executors, administrators, or assigns, such fees as shall accrue to him, the said James H. McKinney, clerk as aforesaid, and charged to the said Bank of Lewisburg, in the prosecution of the said appeal, then the above obligation to —
122 void; otherwise to remain in full force and virtue.

A. C. SNYDER. [SEAL.]
ALEX. F. MATHEWS. [SEAL.]

Sealed and delivered in the presence of—
J. J. JACKSON.

I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for the amount above named.

JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

123–128 I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, do hereby certify that the foregoing is a true transcript of so much of the record and proceedings of a chancery cause lately pending in my said court, at Charleston, wherein Sheffey and Bumgardner, trustees, were plaintiffs and The Bank of Lewisburg and others were defendants, as is requested and required by the attorney of the defendants, in the chancery cause hereinbefore mentioned.

Seal District Court United States, District West Virginia, Charleston, West Va.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my said circuit, at Charleston, this 7th day of February, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the 112th.

JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

129 [Endorsed:] Sheffey & Bumgardner, trustees, *vs.* The Bank of Lewisburg & *als.* Transcript of record. Cl'k's office, D. C. U. S., D. W. Va., Charleston, W. Va.

Endorsed on cover: West Virginia D. C. U. S. No. 644. The Bank of Lewisburg, appellant, *vs.* Hugh W. Sheffey and James Bumgardner, Jr., trustees. Filed February 29, 1888.

JAMES H. McKENNEY,
CLERK

NOTES OF ARGUMENT FOR APPELLANT.

Supreme Court of the United States.

OCTOBER TERM, 1890.

(No. 338.)

THE BANK OF LEWISBURG
vs.
H. W. SHEFFEY AND JAMES BUMGARDNER, TRUSTEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Greenbrier Independent Print, Lewisburg, W. Va.

Supreme Court of the United States.

OCTOBER TERM, 1890.

(No. 338.)

THE BANK OF LEWISBURG
vs.
H. W. SHEFFEY AND JAMES BUMGARDNER, TRUSTEES.

NOTES OF ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

Stuart McClung being the owner of a tract of land in Greenbrier county, State of West Virginia, a suit was instituted in the Circuit Court of said county against him and others by his creditors to subject said land to the payment of liens thereon, a decree was obtained therein directing the land to be sold, a sale thereof was made, and R. J. Glendy became the purchaser, which sale was, prior to October, 1875, confirmed by the Court.

On Oct. 11th, 1875, Glendy executed a trust deed on said land and two other parcels of little value, to secure to the appellant, the Bank of Lewisburg, $15,000 borrowed money. This deed was delivered, but was not then recorded.

By a second trust deed, dated Nov. 20th, 1876, said Glendy and wife "*of the county of Bath, in the State of Virginia*," conveyed said land and other property to the appellees, Sheffey and Bumgardner, trustees, to secure all of his creditors. This deed purports to have been recorded in Greenbrier county on Nov. 21st, 1876.

In April, 1877, the trustee in the Bank deed advertised the land for sale, and in May, 1877, the appellees, Sheffey and Bumgardner, trustees, brought this suit and obtained an injunction to restrain said sale, upon the grounds:

First, That the deed to them had priority over that of the Bank, because it had been first recorded, without knowledge of the existence of the Bank deed; and,

Second, That the acknowledgment of the Bank deed was defective, and, consequently, it had never been legally recorded.

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First, That the deed to them had priority over that of the Bank, because it had been first recorded, without knowledge of the existence of the Bank deed; and,

Second, That the acknowledgment of the Bank deed was defective, and, consequently, it had never been legally recorded.

On July 23rd, 1877, the Bank filed its demurrer and answer.—The plaintiffs filed certain formal exceptions to the answer, which were subsequently waived.

The cause was, on Nov. 10th, 1877, heard upon the motion of the Bank to dissolve the plaintiffs' injunction, which motion the Court took time to consider. And by *consent of the parties* the Court ordered the land to be sold. An order of reference was also made directing a Commissioner to ascertain and report "who are the creditors of the defendant Glendy intended to be secured by the deed of trust, dated Nov. 20th, 1876," and the publication of a notice to convene said creditors.

On May 4th, 1878, the Bank tendered an amended and supplemental answer, to the filing of which the plaintiffs objected, and "the Court being of opinion that the facts stated in said amended and supplemental answer cannot properly be set up by way of answer, and that they are, if properly pleaded, wholly immaterial to the issues involved in the cause, and, if true, can have no bearing upon the rights of the parties as asserted in the cause," refused to allow said answer to be filed. And thereupon the Court perpetuated the injunction and ordered that the fund arising from the sale of said land "be brought into this Court, to be *by it* distributed in accordance with the provisions of the deed," dated Nov. 20th, 1876.

Pursuant to the said consent decree of Nov. 10th, 1877, a sale of the land was made on May 7th, 1878, and reported to the Court. Afterwards by decree of Nov. 12th, 1878, the said report and sale were confirmed without objection. The defendant, the Bank, having on Aug. 2nd, 1878, tendered its petition to re-hear the order of May 4th, 1878, the Court "*by consent of parties* ordered that the consideration of the petition of the defendant for a re-hearing of the decree in said (this) cause at the last term of this Court be postponed until the next term of this Court."

No action was taken on said petition, and no other material order was made in the cause, until Nov. 13th, 1885, when an order was entered in which, after reciting that "the Court being of opinion the decree rendered May 4th, 1878, having been rendered before the Master Commissioner had executed the order of reference made at the November term, 1877, was premature," the Court set aside said decree of May term, 1878. The Court then sustained the exceptions to the report of the Commissioner, and re-committed the report, with directions to the Commissioner to report the amounts and priorities of the debts of Glendy, and whether or not the debt of the Bank is a paramount lien upon the lands, or any of them, under the provisions of the suid deed of Nov. 20th, 1876, or by virtue of said deed of Oct. 11th, 1875, &c., &c.

In this same decree, by consent of the Bank, the plaintiffs amended their bill by inserting the words: "The said Bank of Lewisburg being a corporation duly created and organized under and by the State of West Virginia," &c.

On Nov. 4th, 1886, the Commissioner filed his report, in which he reported that the Bank debt was not entitled to priority, but that it should be paid ratably with the non-preferred debts secured in said deed of Nov. 20th, 1876. The Bank filed exceptions to this report, because its debt was not reported as having priority.

On Nov. 30th, 1887, the Court entered a final decree, by which, for reasons contained in its written opinion, (p. 53,) the Court ordered that the petition of the Bank, tendered Aug. 2nd, 1878, be rejected, that the exceptions to the report of the Commissioner be overruled and said report confirmed. The Court further directed the trustees, Sheffey and Bumgardner, to collect and distribute the fund in controversy *pro rata* upon the debts reported by the Commissioner. And thereupon, on the application of the Bank of Lewisburg, the Court awarded it an appeal and supersedeas from said decree to the Supreme Court of the United States.

Argument.

Was the decree of May 4th, 1878, final?

The Court in its written opinion (Record, p. 55,) holds that the decree of May 4th, 1878, is a final decree; and for that reason decided that, under Equity Rule 88, the petition for the re-hearing could not be allowed, and that the decree of Nov. 13th, 1886, setting aside said decree, was a nullity, because the Court had no control over it after the term at which it was entered, and that the only mode of correcting said decree, if erroneous, was by appeal from it.

If these views of the Court below are sustained, then the appellant is without remedy as to the said decree of May 4th, 1878; because the time limited by law for an appeal from it had elapsed before the present appeal was allowed. It is important, then, to determine whether that was a final decree?

What was the *status* of the cause when said decree of May 4th, 1878, was entered? And what did it adjudicate? Among the issues made by the original answer of the Bank are the following:

First, The plaintiffs had notice of the deed made to secure the Bank at the time the deed under which they claim was executed;

Second, The deed to the plaintiffs recognizes and exempts from its operation the lien of the Bank, and by its terms directs the plaintiffs to pay it as a paramount lien;

Third, The deed to the plaintiffs was never, in fact, legally recorded; and,

Fourth, The said deed is fraudlent and void on its face.

The right to file the amended answer and the questions presented therein were also before the Court.

These were the issues presented by the Record when said decree of May 4th, 1878, was entered. Did said decree adjudicate each and all of said issues?

It will be observed that this decree did not order the sale of the land; that had been done by the *consent of the parties* in a former decree. This consent to a sale by the Court was virtually and of necessity a consent that the injunction should be perpetuated; for, the injunction was merely to prevent a sale by the trustee of the Bank, and the parties, having consented to a sale by the Court, made a sale by said trustee impossible. It thus appears that neither the sale of the land nor the perpetuation of the injunction involved any adjudication by the Court. The only questions decided by the Court in that decree were:

First, The denial of the motion of the Bank to file its amended and supplemental answer; and,

Second, "That the fund arising from the sale of the McClung land *be brought into Court, to be by it distributed* in accordance with the provisions of the deed of Robert J. Glendy to Hugh W. Sheffey and James Bumgardner."

Now, if it be conceded that the Court, by ordering that the proceeds of the sale should be distributed *in accordance with the provisions* of the deed to the plaintiffs, necessarily decided that said deed was a valid instrument and had priority over the deed to the Bank, still, that clearly *left undecided* the important fact, which was distinctly put in issue by the answer of the Bank, whether or not, under and by the terms of said deed to the plaintiffs the debt of the Bank was a "paramount lien" and a preferred debt. The Bank insisted and still insists, as will hereinafter appear, that *by the provisions* of the deed to the plaintiffs its debt was recognized as a "paramount lien" and given priority over the simple contract debts intended to be secured in said deed.

The Court, mindful of the fact that this material question had not been adjudicated, ordered *the fund to be brought into Court to be by it distributed.* Why was the fund ordered to be brought into Court if there was no further questions to be adjudicated and the decree was final? Such an order can be justified upon no other ground than that the decree was not, in fact, and not intended to be final. The Court expressly reserved the right to distribute the fund in accordance with what it should *thereafter determine* to be the rights of the parties under and by the terms of said deed to the plaintiffs. Upon any proper or reasonable construction of said decree it was neither a final nor an appealable decree.

In the leading case of *Forgay vs. Conrad*, 6 How., 204, this Court said: "When the decree decides the right to the property in contest, *and directs it to be delivered up by the defendant to the plaintiff*, or directs it to be sold, or directs the defendant to pay a certain sum of money *to the plaintiff, and the plaintiff is entitled to*

have such decree carried into immediate execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to the Supreme Court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties *pursuant to the decree passed.* * * * This rule of course does not extend to cases *where money is directed to be paid into Court*, or property to be *delivered to a receiver*, or property held in trust to be delivered to a new trustee appointed by the Court, or to cases of the like description. Orders of that kind are frequently and necessarily made in the progress of a cause. *But they are interlocutory only*, and intended to preserve the subject-matter in dispute from waste or dilapidation, and to keep it within the control of the Court *until the rights of the parties concerned can be adjudicated by a final decree.*"

In *Barnard vs. Gibson*, 7 How., 650, the decree was very similar to the one under consideration. In respect to it the Court, in dismissing the appeal on the ground that the decree was not final, says: "The decree in this case is not final within the decisions of this Court. The injunction prayed for was made perpetual, but there was a reference to a Master to ascertain the damages by reason of the infringement."

In *Pulliam vs. Christian*, 6 ~~Wheat.~~ How., 209, the decree set aside a deed and directed an account from trustees. This was held to be an interlocutory decree and the appeal was dismissed.

The syllabus in *Harniston vs. Stainthrop*, 2 Wall., 106, is as follows: "A decree in chancery, awarding to a patentee a *permanent* injunction, and for an account of gains and profits, and that the cause be referred to a Master to take and state the amount, and to report to the Court, is not a final decree within the act of Congress allowing an appeal on a final decree to this Court." The briefs of counsel in the report of this case contain an instructive review of the decisions of this Court as to what is a final decree.

In *Winters vs. Ethell*, 132 U. S., 207, (10 Sup. Ct. Rep., 56,) this Court held that "A decree for the plaintiffs on a bill for an injunction and an accounting, and for the payment to the plaintiffs of the amount found due them, granting an injunction and ordering an accounting before a referee, is not final or appealable, and it is immaterial that it also dismisses a cross-bill of the defendants."

In *Keystone, &c., Co. vs. Martin*, 132 U. S., 91, (10 Sup. Ct. Rep., 32,) many of the cases are reviewed, and the Court there held that "a decree perpetually enjoining defendant from entering upon and removing minerals from plaintiff's land, and ordering an account to be taken of the minerals already removed therefrom, not being final, is not appealable."

Without further quoting from the decisions of this Court, particular attention is called to chapter VII, page 82, of Phillips' Practice of the U. S. Sup. Court, and the following recent decisions of this Court in respect to what is and what is not an appealable de-

cree.—*Railroad Co. vs. Swasey*, 23 Wall., 405, 409; *Daines vs. Kendall*, 119 U. S., 53; *Parsons vs. Robinson*, 122 U. S., 112; *Louisiana Nat. Bank vs. Whiting*, 121 U. S., 284.

The general doctrine to be drawn from the cases is fairly stated in *Bostwick vs. Brinkerhoff*, 106 U. S., 3, by Waite, C. J., as follows: "The rule is well settled and of long standing that a judgment or decree, to be final within the meaning of that term as used in the acts of Congress giving this Court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the Court below would have nothing to do but to execute the judgment or decree it had already rendered." This rule clearly means that a decree to be final must be one which *finally* adjudicates and disposes of *the whole merits* of the case, decides *all* the principles and *all the issues* presented by the pleadings or otherwise arising in the cause. Tested by this rule and the foregoing authorities, it is plain that the aforesaid decree of May 4th, 1878, is an interlocutory, and not a final or appealable decree.

* Bruguier vs. Perkins 16 How. 62.

There is no necessity for a petition for a re-hearing, where the decree is interlocutory only, since on the final hearing all questions arising upon such decree are open.—*Pulliam vs. Pulliam*, 10 Fed. Rep., 53. The sufficiency or the insufficiency, therefore, of the petition filed by the Bank for the re-hearing of said decree of May 4th, 1878, is wholly immaterial, because it was the duty of the Circuit Court on the final hearing to correct it, if erroneous, without such petition. And said decree being interlocutory, if not so corrected, may be reviewed by this Court on this appeal from the final decree.—*Porter vs. Pittsburgh, &c., Steel Co.*, 120 U. S., 649, (7 Sup. Ct. Rep., 741.)

This brings us to the discussion of the errors relied on for the reversal of the decrees in this cause.

Assignment of Errors.

The appellant has assigned and relies on the following grounds of error for the reversal of the decrees of the District Court:

First. The interlocutory decree of May 4th, 1878, is erroneous, because—

1. It, in effect, overruled the demurrer to the bill; and,

2. It denied the motion of the appellant to file its amended and supplemental answer.

Second. The final decree of Nov. 30th, 1887, is erroneous; because—

1. It rejected the petition of the appellant asking for the re-hearing of said decree of May 4th, 1878;

2. It held the deed of Nov. 20th, 1876, to the plaintiffs valid, when it was, *per se*, fraudulent and void;

3. It overruled the appellant's exceptions to the report of Commissioner Gallaher;

4. It held that the said deed to the plaintiffs, though subsequent in date, had priority over that of Oct. 11th, 1875, to secure the appellant;

5. It held that the debt of the appellant was not entitled to priority under the provisions of said deed to the plaintiffs; and,

6. It should have held that the appellant was entitled to the fund in controversy, if for no other reason, upon the ground of its judgment obtained after Glendy had acquired the legal title to the land.

Without discussing these assignments separately we will endeavor to establish the affirmative of the following propositions which involve said assignments, and if we succeed in establishing *any one of them*, then we submit that the aforesaid decrees of the District Court must be reversed:

1. That the demurrer to the plaintiffs' bill should have been sustained;

2. That the trust deed of Nov. 20th, 1876, to the plaintiffs is void on its face;

3. That by the terms of the said deed to the plaintiffs the debt of the appellant is preferred;

4. That the plaintiffs, being grantees of an equitable title, or grantees from a vendor having no recorded title, are not *bona fide* purchasers, nor are they protected by the recording statutes of West Virginia; and,

5. That the deed to the plaintiffs being simply a grant, without covenants, could not, under the laws of West Virginia, draw to it from Glendy the after acquired legal title; and the appellant would be entitled to the fund in controversy by virtue of its judgment.

I.—The Demurrer.

1. The bill does not aver that the land conveyed to the plaintiffs is the same land that was conveyed to secure the Bank. It does not aver what land was conveyed to the trustee for the Bank. Inference or a mere conjecture that the land in both deeds is the same is insufficient pleading and bad on demurrer.

2. The bill does not aver that Glendy owed any debts at the time he executed the trust-deed to the plaintiffs, or that he was indebted to any one at the time the bill was filed. It merely alleges

that the deed secures all the grantor's creditors; and the names of the creditors and the amounts of the debts are not stated therein. This is bad pleading, because the fact that there are creditors and debts secured by the deed is, at most, only a matter of inference and not averment.

3. The only parties to the bill are the plaintiffs, Sheffey and Bumgardner, trustees, and the defendants, the Bank of Lewisburg, A. F. Mathews, trustee, and R. J. Glendy. None of the creditors (if in fact there were any) secured in the trust-deed to the plaintiffs, were parties to the bill, nor, at the time the decree of May 4th, 1878, was entered had any of them been convened by publication or otherwise; no report of the debts or names of creditors had been filed, and none of them except the Bank had at that time filed their debts in the cause. At that time the cause stood on an order of reference to a Master, but he neither made or returned his report until four or five years after the entry of the decree of May 4th, 1878. If, therefore, the said decree was a proper and final decree, as the plaintiffs insist it was, then, according to well-settled equity principles, the whole trust fund, or so much as may be required to pay its debt, must be paid over to the Bank; because it was the only creditor of Glendy then before the Court, and *its debt the only one filed in the cause* at that time. Its debt was secured in the trust deed to the plaintiffs, and, if that decree is held to be a final disposition of the fund, the Bank is the only creditor that can take under it. For, it would be absurd to claim that a creditor who was not a party and had not filed his debt at the time the *final* decree was entered in the cause, could take any benefit under said decree or in the cause. So, whether the contention of the plaintiffs is right or wrong the result must be adverse to their claims.—But to return from this digression.

It is an elementary principle that it is not sufficient to give a Court of Equity jurisdiction to adjudicate the rights of parties to a trust fund, that the trustees only are parties to the suit; but it is indispensable that the beneficiaries or *cestuis que trusts* should be brought before the Court. Equity Rule 48 provides that when the parties are very numerous on either side the Court may dispense with making *all* of them parties, and may proceed, having *sufficient parties* before it to represent *all the adverse interests* of the plaintiffs and defendants in the suit. But in such cases the decree shall be without prejudice to the rights of the absent parties.

The trustees do not represent the conflicting claims of the *cestuis que trusts;* and therefore, at least, a part of these should be parties to the bill and brought into Court, and then by publication the others might be convened before a Master to file their claims, and thus make themselves parties. Unless they are so made parties the Court has no jurisdiction to make any decree affecting their interests in the trust fund. As to them the decree would be *coram non judice* and void.—*Collins vs. Loftus*, 10 Leigh, 5; *Ryan vs. Blount*, Dev. Eq., 382; *Prieto vs. Duncan*, 22 Ill., 26.

2.—The trust-deed to the plaintiffs is void on its face.

It purports to be a conveyance to secure generally the debts of the grantor. It neither mentions the name of any creditor, nor any specified debt. In England, and, I apprehend, in this country also, where the Statute of 27 Eliz. C, 4, is in force as it is in West Virginia, the law is that "a conveyance for the payment of debts generally, to which no creditor is a party, nor any particular debts expressed, is a fraudulent conveyance within the Statute 27 Eliz. C, 4, and, therefore, void as against a subsequent purchaser for valuable consideration."—2 Spence Eq. Jur., 351; *Leach vs. Leach*, 1 Ch. Ca., 249; Sug. V. P., 158, 929. And for the same reasons such a conveyance is fraudulent and void as to the creditors of the grantor.—*Widgery vs. Haskell*, 5 Mass., 144.

The said deed conveys *live stock* and other *personal property* as well as real estate, yet it postpones the sale of the property for six months, and, even then, the time of the sale is at the discretion of the trustees and may be *indefinitely* postponed.

The terms of an assignment or trust deed cannot extend for any time, however short, the time of the credit between the debtor and his creditor. The creditor whose debt is due has the legal right to enforce it at once, and he cannot be compelled by the terms of an assignment, to which he has not assented, to forego this right or to wait until such time as the trustee sees fit to sell the property and apply the proceeds to the payment of his debt. And, if by the terms of the assignment such postponement is required, or such power is given to the trustee, the instrument is void *per se*, as tending to "hinder, delay and defraud creditors."—*McCleery vs. Allen*, 7 Neb., 21, (29 Am. R., 377;) *Rapalee vs. Stewart*, 27 N. Y., 310 ~~301~~; *Keef vs. Sanderson*, 2 Wis., 42.

The deed does not authorize the trustees to take possession of the property, but *leaves it in the hands and control of the insolvent grantor*; and thus leaves an uncertain estate for no fixed time, to be used or disposed of by him for his own use and benefit. This makes the deed fraudulent and void under the law of West Virginia.—*Livesay vs. Beard*, 22 W. Va., 585; *Card vs. Miller*, 7 Grat., 185; *Lewis vs. Caperton*, 8 Grat., 148; *Quarles vs. Kerr*, 14 Grat., 48; *Hamilton vs. Russell*, 1 Cranch., ~~310~~ 309; *Ward vs. Trotter*, 3 Mon., 1; *Dean vs. Skinner*, 42 Iowa, 418; *Means vs. Dowd*, 128 U. S., 273.

3.—By the terms of the deed of Nov. 20th, 1876, to the plaintiffs the debt of the Bank is preferred.

The preamble of the deed states that the grantor "desires to secure, and, at the same time, *prevent* any of his creditors from *getting priorities* over others, and place said creditors on a footing of entire equality." The general object of the deed, thus ex-

pressly declared, is to *prevent* any creditors from GETTING PRIORITY. It is, therefore, apparent that it was not the purpose of the grantor to *destroy existing priorities*, which he had voluntarily created and could not impair without actual fraud. The object was to preserve the rights of all his creditors as they then stood, and prevent any disturbance of them by efforts to obtain preferences by suits or otherwise. "Entire equality" is the language employed, which means even justice and good faith towards all his creditors. There is no purpose, either expressed or implied, of bad faith or an intent to defraud any one, or deprive any creditor of any right or preference which he then had. This purpose is made, if possible, still more manifest and decisive by the following provision of the deed: "And upon the further trust that, after discharging the amounts due from said R. J. Glendy on judgments against him, and on vendors' and *other paramount liens now binding* said lands hereby conveyed, the trust fund shall be distributed ratably among the creditors of said R. J. Glendy," &c.

A judgment, whether docketed or not, is *a lien binding* upon all of the real estate of the debtor in the State. So a trust-deed, whether recorded or not, is *a lien binding* upon the lands conveyed by it. Neither the docketing of the one nor the recording of the other adds one scintilla to its validity or binding force. The only effect of the docketing or recording is to preserve the lien against subsequent purchasers for value without notice. While the land continues the property of the debtor the lien remains effectual. So if the subsequent purchaser pays no valuable consideration or has notice of such judgment or trust deed, the lien continues to bind the land in his hands, without being docketed or registered. Of course, therefore, if the deed by which the subsequent purchaser acquires his titles recognizes this lien and provides for its payment as a *paramount lien*, as does the deed under consideration, this will not only be notice to him, but make the conveyance subordinate to such lien, and thus dispense with registration.

The trustees are directed by the deed to first pay off the "amounts due from said Glendy on judgments against him, and on vendors' and other paramount liens." If there could be any doubt as to the time meant by these words, that is, whether they refer to liens binding upon the lands of the grantor at the time they were written in the deed, or after the recordation of the deed, any such doubt is completely removed by the words, "*Now binding said lands*," which immediately follow. The only fair construction is, that the liens referred to, and intended by the terms used, were those which were *then* paramount to the debts of the general creditors secured, and which were directed to be paid ratably *after paying said liens*. The grantor could not know how long it might be before the trustees should have the deed recorded, and therefore when he used the words "*now binding* upon said lands" he could not have intended such liens as might be binding at some indefinite time in the future, that is, such as should be binding after the

deed had been recorded, if it should, in fact, ever be recorded.—Such a construction would not only eliminate the words "*now binding*," but it would render the whole provision meaningless and of no effect whatever; for, if said provision had reference to such liens only as would be paramount to the liens created by the deed *after* it had been recorded, any such provision was useless and wholly unnecessary, because such liens would be as operative without said provision as with it, and in either case the effect would be exactly the same.

No rule of legal construction is better settled than that which requires effect to be given to each and every part and provision of a written instrument, and, where it is at all possible to do so, no Court would be warranted in holding that such provision was inserted without a purpose, or that no effect should be given to it.—Therefore, giving this provision a reasonable construction and the only operative effect that the context will admit of, it must be held to mean that liens of every character, whether judgments, trust deeds or vendors' liens, *then existing and binding the lands* conveyed by the deed, should be paid as preferred claims. It is impossible, therefore, to exclude any lien which was, before and at the time the deed was executed, paramount to the simple contract debts secured by said deed, whether such lien was ever registered or not. The Bank of Lewisburg had such a lien—a lien which was then valid and binding upon said lands, and consequently, by the express terms of the deed the integrity of said lien was preserved and directed to be paid as a preferred debt.

4.—The plaintiffs, being grantees of an equitable title, or grantees from a vendor having no recorded title, are not bona fide purchasers nor are they protected by the recording statutes of West Virginia.

At the time Glendy executed the trust to secure the Bank the legal title was outstanding. Glendy was simply the equitable owner, without any recorded or recordable title. By his deed to the Bank he divested himself of his equitable title, and nothing remained in him except his right to the equity of redemption in this equitable estate.

Having, then, neither the legal nor the equitable title to the land, but simply this equity of redemption, Glendy made the deed to the plaintiffs under which they now claim the fund in controversy in this suit. The plaintiffs admit, and there is no question as to the fact, that the Bank deed is prior in time to theirs, and binding upon Glendy and all others who are not *bona fide* purchasers or protected by the recording statutes of the State. The plaintiffs rest their title to the fund in dispute wholly upon the ground that their deed was first recorded, and that, therefore, under the provisions of the statutes of West Virginia, they are entitled to priority. The only statutes having any direct relation to the subject are as follows:

"4. Any contract in writing, made in respect to real estate or goods and chattels, in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein of more than five years, shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract.

5. Every such contract, every deed conveying any such estate or term, and every deed of gift, or deed of trust or mortgage, conveying real estate or goods and chattels, shall be void as to creditors and subsequent *purchasers for valuable consideration* without *notice*, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract or deed may be.

* * * * * * * * * * *

10. A purchaser shall not, under this chapter, or chapter seventy-five, be affected by the record of a deed or contract made by the person under whom his title is not derived, nor by the record of a deed or contract made by any person before the date of a deed or contract made by, to or with such person, which is duly admitted to record, and from which the title of such person is derived."—Sections 4, 5 and 10, chap. 74, Code W. Va.

It will be observed that it is only purchasers *for a valuable consideration and without notice*, who are protected under this statute. As to such a prior unrecorded contract or deed is void. Are the plaintiffs such purchasers? If they are not, then they are not entitled to the relief they ask; because, according to the maxim, "*qui prior est tempore potio est jure*," the right of the Bank being prior in time is superior in law.

The words, "purchaser for valuable consideration without notice," used in the above statute, are the same or the equivalent of the language used in the statutes of most, if not all, of the American States, and they have uniformly been held to mean a *bona fide* purchaser for valuable consideration. It was so held by C. J. Kent in *Jackson vs. Bargott*, 10 Johns., 457.

In *People's Bank vs. Bates*, 120 U. S., 356, (7 Sup. Ct. Rep., 679, 682,) this Court says: "In *Kohl vs. Lynn*, 34 Mich., 360, the Supreme Court said that the 'statute which makes a mortgage of chattels, which has not been recorded, void against subsequent purchasers or mortgages in good faith, uses those terms in the sense which *has always* been attached to them by judicial decisions.'—Guided by this rule, which we deem a sound one, we concur with the Court below in holding that the words 'mortgagees in good faith' mean the same thing as 'mortgagees for a valuable consideration without notice.'"

Regarding, then, as we may safely do, that a subsequent purchaser, to be entitled to the protection of the recording statutes of West Virginia, must be a *bona fide* purchaser for a valuable con-

sideration, it follows necessarily that, if he is not such *bona fide* purchaser, then he is not entitled to the benefit of the statute, and whether or not the prior conveyance is recorded is wholly immaterial. The important question, then, to be determined is, whether or not the plaintiffs are *bona fide* purchasers for value.

To constitute such a purchaser it is essential that there should be, *first*, a valuable consideration, *second*, the absence of notice, and, *third*, the presence of good faith. In respect to the two latter it may be said that in strict theory the presence of notice may perhaps be regarded only as an indication of the want of good faith. Practically, therefore, the essential elements to constitute such purchaser are (1) a valuable consideration, and (2) the absence of notice. If either of these two essentials are wanting the party is not a *bona fide* purchaser, and the registration of his conveyance will avail him nothing.

1. Are the plaintiffs purchasers for a valuable consideration? No person who has acquired title as a mere volunteer, whether by gift, devise, inheritance, post-nuptial settlement on a wife or child, or otherwise, can be a *bona fide* purchaser for value. Valuable consideration means, and necessarily requires under every form and kind of purchase, something of actual value capable in estimation of law of pecuniary measurement, parting with money or money's worth, or an *actual change* of the purchaser's legal position for the worse. The amount of the purchase, if otherwise in good faith, is not generally material. As examples of what clearly amount to valuable consideration are the following: A contemporaneous advance or loan of money, or a sale, transfer, or exchange of property made at the time of the pnrchase or execution of the instrument, the surrender or relinquishment of an existing legal right, or the assumption of a new legal obligation which is in its nature irrevocable. Whether this species of valuable consideration embraces the *discharge* or the *extension* of an antecedent debt is a question upon which the authorities are conflicting. In general, however, it is requisite that the money be paid or advanced, the property transferred, the right surrendered, or the obligation assumed, *at the time of the conveyance*, and as a part of the transaction, in order that it may be the valuable consideration which can protect the purchaser. 2 Pom. Eq. Jur., §747.

"A conveyance of real or personal property as security for an antecedent debt does not, upon principle," says Mr. Pomeroy, "render the transferee a *bona fide* purchaser, since the creditor parts with no value, surrenders no right, and places himself in no worse legal position than before. The rule has been settled, therefore, in very many of the States, that such a transfer is not made upon a valuable consideration within the meaning of the doctrine of *bona fide* purchaser. * * * It is very generally settled, *in accordance with principle*, that an assignment made by a debtor in trust for the benefit of his creditors is not a conveyance upon valuable consid-

eration, and neither the assignee nor the creditors thereby become *bona fide* purchasers."—2 Pom. Eq. Jur., §749.

The doctrine thus announced is the rule in every State in the Union, so far as I have been able to ascertain, with the exception of the State of California, whose decisions seem to be controlled by the wording of the statutes in that State—*Graff vs. Middleton*, 43 Cal., 341—and the States of Virginia and West Virginia, to be hereafter noticed.—See note to *Basset vs. Nosworthy*, 2 Lead. Cas. Eq., (3rd Am. from 2nd Eng. Ed.,) 104 to 108, and also the following cases—*Dickerson vs. Tillinghest*, 4 Paige, ch. 215; *DeLancey vs. Stearns*, 66 N. Y., 162; *Clark vs. Flint*, 22 Pick., 231; *Steffen vs. Milmo Bank*, 69 Tex., 513; *Gilchrist vs. Gough*, 63 Ind., 584, (79 Am. Dec., 421, note;) *Dunlap vs. Burnett*, 5 Sm. & Marsh., 702: *Speckman vs. Ott*, 65 Pa. St., 131; *Willis vs. Henderson*, 4 Scam., 13; *Palmer vs. Thayer*, 28 Conn., 246; *Hodgden vs. Hubbard*, 18 Vt., 504; *Holstead vs. Bank*, 4 J. J. Marsh., 554; *Donaldson vs. Bank of Cape Fear*, 1 Dev., Ch. 103; *Bragg vs. Poulk*, 42 Me., 502.

The same doctrine seems to be the settled rule of the United States Courts. In the well considered case of *Morse vs. Godfrey*, 3 Story, 364, Judge Story decides that a trustee for creditors in a deed made to secure an antecedent debt, is not a purchaser for value. In *Johnson vs. Peck*, 1 Woodb. & M., the same rule was announced.

In the recent case of *People's Sav. Bank vs. Bates*, 120 U. S., 556, this Court, after a careful review of the Federal and other cases on the subject, decided that "The giving of a mortgage merely as a collateral security for past indebtedness will not constitute the mortgagee a mortgagee for value."

These authorities, it would seem, would be conclusive of the case at bar, unless this Court is obliged to discard the rule established by its own decisions and follow the decisions of the West Virginia Courts. As before stated the rule in Virginia and West Virginia is in conflict with the general and almost universal rule of American Courts on this subject. They hold that a trustee, in deed to secure any class of debts, is a purchaser for value. There is no case in either State in which the reason for the anomalous rule, followed there, is discussed. The doctrine seems to have commenced with the case of *Wickham vs. Lewis Martin & Co.*, 13 Grat., 427, in which the Court treat the rule as established in Virginia, and cites as authority therefor the case of *Williams vs. Given*, 6 Grat., 268, which was an action at law for a slave which had been purchased for counterfeit money and afterwards sold and delivered by the fraudulent vendee to a *bona fide* purchaser for value. The purchaser here was clearly a purchaser for value *paid at the time* of the purchase, and, therefore, there was no analogy between this case and that in which it was cited as a precedent.—The next case in Virginia was *Evans vs. Greenhow*, 15 Grat., 153. This simply follows *Wickham vs. Lewis Martin & Co.*, *supra*, and

all the other cases in both the States simply recognize the rule and cite the preceding cases as the authority for it. These cases are not only unsupported by reason and contrary to the uniform rule in nearly, if not all, the other American Courts, but they are inconsistent with the rulings of the said Court, because in *Prentice vs. Zane*, 2 Grat., 262, the Court decided that "The holder of a negotiable note taken as collateral security, holds it subject to all the equities of the maker against the party from whom the holder received it." This case goes to the extreme in an opposite direction, and is also contrary to the great weight of authority.

It must be a very inflexible rule that would justify any Court in following decisions so conflicting and contrary to reason, to its own rulings and the rulings of nearly all other Courts.

It is, however, submitted that this is not one of that class of decisions of a State Court which will be followed by a Federal Court against the rule established by its own jurisdiction.

In *Swift vs. Tyson*, 16 Pet., 1, 18, 19, this Court, construing sec. 34 of the Judicial Act, 1789, says: "It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usage of a fixed and permanent operation, as, for example, to the construction of ordinary *contracts or other written instruments*, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves," &c.

In *Lane vs. Vick*, 3 How., 464, this Court decided that the Federal Courts did not follow the State Courts in the construction of a will or any other *written instrument* as they do in the construction of statutes. The reasons are still stronger why the decisions of the State Court should not be held obligatory in equity cases, because the statute only refers to the "laws" in "trials at common law."—*Neves vs. Scott*, 13 How., 268; *Mitchell vs. Burlington*, 4 Wall., 270; *Olcot vs. Supervisors*, 16 Wall., 678; *Township vs. Tolcot*, 19 Wall., 677.

In *Pease vs. Peck*, 18 How., 598, it was held that "when this Court has *first decided a question* arising under State laws we do not feel bound *to surrender our convictions*. When the decisions of the State Court are not consistent we do not feel bound to follow the last, if contrary to our convictions." And in *Town of Venice vs. Murdock*, 92 U. S., 494, this Court held that "The decisions of the Court of Appeals of the State of New York on cases arising upon the *same statute, and a similar state of facts*, are not conclusive on this Court, as such decisions do not present a case of statutory construction."—*Watson vs. Tarpley*, 18 How., 517.

It would seem to be the fair conclusion from the decisions that this Court will not follow the State Court in a case like the one at bar. This Court has not only decided for itself the question involved, but, adhering to the rule of nearly all the States of the

Union, it has recognized the question as one belonging to the domain of general jurisprudence.

The question here does not arise out of the construction of the State Constitution or any local statute, and if, in any degree, it involves the construction of a statute, it is one that, in all essentials, is common to nearly, or quite, all the States of the Union. It involves merely the interpretation of the words "purchaser for valuable consideration," which happen to occur in the statute and which apply to purchasers of goods and chattels and *personal property* as well as to real estate.

But the case before us is different from the most, if not all, of the cases decided in Virginia and West Virginia. The instrument to be construed is not a trust deed, upon a legal title or estate, made to secure *specific or named creditors*, but it is simply *a general assignment* for the benefit of all the creditors of the grantor, without specifying any names or debts, and conveys only personal property and an equitable interest in certain real estate. Certainly, in this case, there was no consideration furnished, or prejudice suffered by, any creditor *at the time or on account of* the execution of this deed; because it is apparent from the character and terms of the deed that it was executed without the knowledge of the creditors. In any proper view, therefore, it seems plain that the trustees and creditors in said instrument cannot be considered purchasers for valuable consideration.

2.—Are the plaintiffs purchasers without notice? And, are they protected under the registry laws of West Virginia?

There is no question that notice to the trustees is notice to the creditors.—*Beverly vs. Brooke*, 2 Leigh, 425; *Fidelity Co. vs. Railroad Co.*, 32 W. Va., 244.

The answer of the Bank avers positively that the plaintiffs, the trustees, had, before and at the time the deed was executed, *actual notice* of the existence of the prior deed to the Bank.—(Record, p. 10.) There was no replication to this answer; consequently, this fact must be taken as true. But, aside from this admission, Sheffey, one of the trustees, admits in his statement—(Record, p. 50)—that he had notice of the Bank deed before the deed to him and Bumgardner was recorded; and the facts and circumstances detailed by him in said statement, in connection with the other evidence in the cause, show that he had knowledge of the existence of said prior deed before the deed to the plaintiffs was executed.

If, however, the plaintiffs did not, in fact, have actual notice of the Bank deed, they had such constructive notice as deprives them of the position of *bona fide* purchasers.

It will be remembered that, as hereinbefore stated, at the time Glendy executed the trust-deed to the plaintiffs, the legal title was

outstanding, and that he had merely the equity of redemption in an equitable estate. It is not averred in the bill, and it is nowhere shown by the record, that Glendy was at the time, or ever had been, in possession of the land. The question, then, presented is, whether the grantee in a deed from a grantor who had simply an equitable estate in, and no record title to, the land granted, is entitled to the position of a *bona fide* purchaser, either under the general equity doctrine or under the recording statutes of West Virginia?

It is the settled doctrine that, as a general rule of law, the title of a purchaser is necessarily limited to, and can rise no higher than, that of the seller, for the obvious reason that while the seller cannot sell what he does not own, the purchaser can acquire no more. A bad title, evidently, cannot be made good by simply transferrsng it, and it must necessarily remain the same after each transfer that it was before. The maxim, *nemo plus ad alium transferre potest, quam ipse habet*, expresses both the rule and the reason of it.

While this is absolutely true as a general rule, Courts of Equity and the law, in the interest of justice, have made an exception to it in favor of a *bona fide* purchaser; that is, a purchaser who has used all the precautions that it is possible for a prudent and diligent person to do, and has paid the purchase money and secured the title, without notice of any outstanding equity or defect in his title. But if such purchaser buys with a knowledge that his purchase is that of a title which falls short of the legal title, or with notice of the antecedent rights of others, or with the knowledge of facts which indicate a defect of title or antecedent rights of others, or even in ignorance of such defect or antecedent rights, if they are such that due diligence and proper precaution would have disclosed them to him, he will not be treated as a *bona fide* purchaser, and entitled to be protected as such in a Court of Equity. In such cases the general rule will be enforced and his title will be held subject to the same rights and equities that attached to it in the hands of his vendor. The reason of these strict requirements is, that the protection accorded to a *bona fide* purchaser is an exception to and departure from the general rule above stated, which holds that no one can transfer a greater right or better title than he possesses. The exception, therefore, has no application to the case of a purchaser of an equitable title. In such case the right acquired by the vendee is necessarily limited to that of his vendor. Why this is so, is forcibly stated in, *Chew vs. Burnett*, 12 Serg. & R., 389, by Gibson Ch. J., who says:

"When it is asserted that a purchaser for a valuable consideration takes the title free from every trust or equity of which he has no notice, it is intended of the purchase of *a title perfect on its face, for every purchaser of an imperfect title takes it with all its imperfections on its head.* It is his own fault that he confides in a title which appears defective to his own eyes, and he does so at his

own peril. Now, *every equitable title is imcomplete on its face.* It is nothing more than a title to go into chancery to have the legal title conveyed, and, therefore, *every purchaser of a mere equity takes it subject to every clog that may lie on it, whether he had notice or not.*" To the same effect are the following authorities: *Kramer vs. Arthurs*, 7 Barr, 165; *Sergeant vs. Ingersoll*, *Id.*, 3 Harris, 343; *Polk vs. Gallant* 2 Dev. & Bat. Eq., 395, (34 Am. Dec., 410, 413, note;) *Snelgrove vs. Snelgrove*, 4 Desau. 274; *Craig vs. Leiper*,, 2 Yerg., 193; *Stont vs. Hyatt*, 13 Kan., 232; *Durant vs. Crowell*, 97 N. C., 367; *O'Neal vs. Seixas*, 85 Ala., For a very full note and citation of many authorities on this question, see 97 Am. Dec., 433.

Where neither party has the legal title and the equities are equal the maxim prevails, *prior est tempore, potior est jure—Elsner vs. Fife*, Ohio St., 358; 17 Ind 11; 11 Ohio 455.

This doctrine is uniformly enforced and adhered to with great strictness by this Court. Thus in *Vattier vs. Hinde*, 7 Peters, 252, 271, Marshall, Ch. J., said: "The rules respecting a purchaser, without notice, are framed for the protection of him who purchases the *legal estate* and pays the purchase money without knowledge of an outstanding equity. They do not protect a person who acquires no semblance of title. They apply fully only to the purchaser of the legal estate. Even the purchaser of an equity is bound to take notice of any prior equity."

In *Boone vs. Chiles*, 10 Pet., 177, 212, the Court says: "The title purchased must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a Court of Equity." See also, *Shirras vs. Craig*, 7 Cranch, 48; *Hallett vs. Collins*, 10 How., 174; 1 Story's Eq. Jur., §64; 2 Id., §1,502; Adams' Eq., (6 Am. Ed.) p. 340, note 1.

In Virginia, where the recording statutes are identical with those of West Virginia, the same doctrine is strictly enforced—*Briscoe vs. Ashby*, 24 Grat., 454; *Doswell vs. Buchanan*, 3 Leigh, 365.

In *Briscoe vs. Ashby*, *supra*, which was a case vary similar in its facts to the one at bar, the Court held that the prior equity, though unrecorded, was superior to the rights of the subsequent purchaser of an equitable title, who had paid the purchase money and had his deed therefor recorded without notice of the prior equity. In speaking of the purchaser of an equitable title, the Court says: "The purchaser of such a title cannot occupy the position of a *bona fide* purchaser without notice. *The fact that the legal title is outstanding is, of itself, notice* to him of the risks which which he assumes by becoming the purchaser of a mere equity," &c., p. 474.

Some of the authorities hold that, if a vendee purchases a title which he, in good faith, *believes* to be a good and valid legal title,

he may be a *bona fide* purchaser; and that it is only in cases e they the vendee *knowingly* purchases an equitable title that he be treated as a *bona fide* purchaser. In order that this n taken as a correct statement of the law, the purchaser must lish, as the grounds of his belief, that before making his pu *ithout* he took all the well-established and reasonable precautions *to it* certain the character of his vendor's title, such as a thorough *s enti-* nation of his title papers, *a search of the record*, and an i into the rights and equities of those in the actual possession land. The failure to take these customary and usual preca deed, and especially that of examining the public records when th e next such, may be justly characterized as gross negligence, and wi sequently, make the purchaser liable for all the consequen ion be such omissions or negligence, which are equally injurious, w *right*, they proceed from design or from *laches*. Such being the rantor tablished rule of law, in this country it is practically impossi a vendee to purchase real estate in any State having a regis mmon law, without a knowledge of the character of the title he pur . Ed.,) unless he either negligently or designedly omits to search ate has cords, which will not excuse him; consequently, in contem of law, and the rule which protects a *bona fide* purchaser purchaser of an equitable title to real estate, in a State ha ., 406, public registration law, must be held to have made the p s:) with a knowledge that it was merely an equitable title and t r right legal title was outstanding. Craig & Leiper 2 Yerg have,

It is equally true that a purchaser from a vendor, who *recorded* conveyance or title, will take the land subject to a rantor, ties against it in the hands of his vendor. If he finds that dor has no recorded or recordable title, it is his right to r purchase until the vendor obtains and records the legal title tute on fails or neglects to do so, it is his own fault—*Jackson vs.* is not Cow. 120. Tobey & Simpson 11 N. J. Eq. 2 or as- d title,

It is further true, that a purchaser from a vendor, wh recorded title, whether his title be legal or equitable, canno in and cording his deed, protect himself against one who purchas to the such vendor *after* the vendor has put his deed on record; of the under the general law as well as under the express mandat ces the statute of West Virginia—sec. 10, ch. 74, hereinbefore copie broken, subsequent purchaser will not be affected by the deed so *before* the vendor put his deed upon record.—*Doswell vs. Bu* rds ac- 3 Leigh, 365; *Hoult vs. Donahue*, 21 W. Va., 294. he spe-

It is well settled that a search for liens or conveyan not es- not be prosecuted further than the period at which the titl *s. Har-* of record in the party against whom the search is made; f *well vs.* would be no certainty or safety in the acquisition of lan grantee can be bound or prejudiced by the acts or default grantor prior to the acquisition of the title passed by the neither Rawle on Cov. for Title, (5th Ed.,) §259, p. 406; 2 Pomer IcClung

Sargent v Bank &c. 1 B. Mon. 268.

Jur., §761. Such being the case the reasonable result is, that a purchase from a vendor, *who has no recorded title*, is not required to record his deed; because, if he does so, it it will not protect him against a subsequent purchaser, who purchases *after* the vendor has put his title on record; and as to a second purchaser from such vendor *before* he has a record title, the first purchaser will be protected as against him, because such second vendee being a purchaser from a vendor having no recorded title, he will take subject to all the equities against his vendor and per consequence subject to the rights of such first purchaser.—*Page vs. Waring*, ~~7 N. Y.~~, 463. To put such a deed on record would be a vain thing; because it would be no protection to the grantee in it, and no notice to any subsequent purchaser of the legal title. Nor would the failure to record it injure a second purchaser, who purchased before the vendor recorded his title, because, in searching the record, under the established rule he would first look for the conveyance to such vendor, and finding no such conveyance, his search under the rule would end. It would not be his duty to search for incumbrances or conveyances by a person who never had any record title to the land.—*Veazie vs. Parker*, 23 Me., 170; *Cook vs. Travis*, 22 Barb., 338; *Van Ransellear vs. Clark*, 17 Wend., 25; 2 Pom. Jur., §761; *Connecticut vs. Bradish*, 14 Mass., ~~221~~ 256.

The recording of a deed must be by authority; therefore, the recording of a deed that does not come within the protection of the statute will not be notice.—*Walker vs. Gilbert*, 1 Freem., ch. ~~25~~ 85. *

Applying these principles to the case before us it follows that the deed to the Bank, the appellant here, having been taken from Glendy before he had any recorded title, there was no requirement of law which made it the duty of the Bank to put its deed upon record; and its omission to do so could not in any legal sense have injured or prejudiced the plaintiffs, the appellees here, as subsequent purchasers.—2 Pomery's Eq. Jur., §761.

While the statute of West Virginia—sec. 4, ch. 74, hereinbefore copied—provides for the recordation of contracts, the effect of such record is merely to put the contract on the footing of a recorded deed. It is not made a duty to record a contract where, if such contract were a deed, there would be no duty to record it. It would have been equally vain and useless for the Bank to have had its trust deed recorded, whether it be considered a contract or a deed. If, however, Glendy had claimed under an executory contract *of record*, then it would, perhaps, have been the duty of the Bank to put its deed on record, and its failure to do so probably would, as between it and the plaintiffs, the appellees here, have given their deed priority, provided they had had no actual notice of the Bank deed. But as Glendy had no recorded title of any kind that question does not arise.

The necessary conclusion is, therefore, that the appellees, Shef-

* Ford v Beckman 1 Johns. Ch. 258, 300; Hallett v Bank 4 J. J. Marsh. 584, 588.

fey and Bumgardner, are neither *bona fide* purchasers nor are they protected by the registration statutes of West Virginia.

5—The deed to the plaintiffs, being simply a grant without covenants, could not under the laws of West Virginia draw to it from Glendy the after acquired legal title; and the Bank is entitled to the fund in controversy by virtue of its judgment.

The first section of the State statute gives the form of a deed, without covenants, such as the deed to the plaintiffs, and the next section is as follows:

"2. Every such deed, conveying lands, unless an exception be made therein, shall be construed to include *all the estate, right, title and interest* whatever, both at law and in equity, of the grantor in or to such lands."—Code W. Va., sec. 2, ch. 72.

It is apparent that such a deed is nothing more than a common law quit-claim conveyance.—2 Smith's Lead. Cas., (6th Am. Ed.,) 709, and cases cited. In fact, the Supreme Court of the State has so construed it.

In *Western M. & M. Co. vs. Peytona Coal Co.*, 8 W. Va., 406, 411, 446, the Court in applying this statute held, (see syllabus:)

"24. A grant of land is a mere transfer of such title or right thereto as the grantor, at the time of the grant, may hold or have, absolutely or contingently.

25. A grant does not imply an assertion of title in the grantor, or a covenant with the grantee to warrant the land.

26. A bargain and sale of land, intended, under the statute on the subject, to operate as a present conveyance or transfer, is not an assertion of title that will estop the bargainer, his heirs or assignees, from tne subsequent assertion of an after acquired title, and does not imply a covenant of warranty.

28. If at the time of the execution of a grant or bargain and sale of land, with a covenant of special warranty, the title to the land be in a third person, not because of any act or default of the covenanter, and such person afterwards asserts and enforces the title against the covenantee, the covenant is not thereby broken, and the covenantor is in no way responsible.

29. In such case, if the covenantor, himself, afterwards acquires the title to the land, the title does not by reason of the special warranty vest in the covenantee, and the covenantor is not estopped to assert it or grant it to another." See also *Wynn vs. Harman*, 5 Grat., 157; *Bruce vs. Lake*, 12 Am. R., 401; *Doswell vs. Buchanan*, 3 Leigh, 365.

At the time Glendy conveyed to the plaintiffs he had neither the legal nor the equitable title—the legal title was in McClung

and the equitable title in Mathews, trustee for the Bank. But concede that he had the equitable title, and that that title vested in the plaintiffs upon the recordation of their deed. This left the legal title still outstanding. The plaintiffs' deed having no covenants of any kind, not even a special warranty, they cannot by an action of ejectment recover the land from Glendy, because in such action the legal title will prevail; nor can they by suit in equity compel Glendy to convey to them the legal title, because, according to the law as above stated, Glendy had the right to acquire the outstanding title and "is not estopped to assert it or grant it to another."—*Jackson vs. Wright*, 14 Johns., 193; Co. Litt., 265.

It may be urged, however, that the deed to secure the Bank is also a grant, without covenants, and that, therefore, the right of the Bank to relief in this suit is equally as impossible as that of the plaintiffs. In reply to this it may be asserted that the Bank is a defendant and not the complainant. But the complete answer to this position is, that the Bank, after Glendy obtained the legal title, recovered a judgment for its debt, which it caused to be duly docketed, and thereby acquired a *legal lien* upon *the legal* title. This legal lien it has the unquestioned right to enforce in a Court of Equity against the land in the hands of Glendy or any purchaser subsequent to the docketing of its judgment. And having this right, and the land having been sold in this suit by the consent of all the parties, the Bank is entitled to the proceeds of the said land.

It is, therefore, earnestly insisted that, upon each and all of the views above presented, the appellant is entitled to a reversal of the decrees of the District Court and to a decree here for the fund in controversy.

A. C. Snyder,
Counsel for Appellant.

Supreme Court of the United States.

BANK OF LEWISBURG, APPELLANT,
vs.
SHEFFEY & BUMGARDNER, APPELLEES.

OCT. TERM, 1890.

(No. 338.)

ASSIGNMENT OF ERRORS.

ASSIGNMENT OF ERRORS.

The appellant assigns the following grounds of error for the reversal of the decrees of the District Court in this cause:

First. The interlocutory decree of May 4th, 1878, is erroneous, because—

1. It, in effect, overruled the demurrer to the bill; and,

2. It denied the motion of the appellant to file its amended and supplemental answer.

Second. The final decree of Nov. 30th, 1887, is erroneous; because—

1. It rejected the petition of the appellant asking for the rehearing of said decree of May 4th, 1878;

2. It held the deed of Nov. 20th, 1876, to the plaintiffs valid, when it was, *per se*, fraudulent and void;

3. It overruled the appellant's exceptions to the report of Commissioner Gallaher;

4. It held that the said deed to the plaintiffs, though subsequent in date, had priority over that of Oct. 11th, 1875, to secure the appellant;

5. It held that the debt of the appellant was not entitled to priority under the provisions of said deed to the plaintiffs; and,

6. It should have held that the appellant was entitled to the fund in controversy, if for no other reason, upon the ground of its judgment obtained after Glendy had acquired the legal title to the land.

BANK OF LEWISBURG.

A. C. SNYDER, Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 338

THE BANK OF LEWISBURG, - APPELLANT.

vs.

HUGH W. SHEFFEY AND JAMES BUMGARDNER, JR., - - APPELLEES.

Appeal from the Circuit Court of the United States for the District of West Virginia.

BRIEF FOR APPELLEES.

JAMES BUMGARDNER, JR.,
A. B. BROWNE,
A. T. Britton for Appellees.

STAUNTON, VA.:
STONEBURNER & PRUFER, STEAM PRINTERS,
1891.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE BANK OF LEWISBURG, - APPELLANT.

vs.

HUGH W. SHEFFEY AND JAMES BUMGARDNER, JR., - - APPELLEES.

Appeal from the Circuit Court of the United States for the District of West Virginia.

BRIEF FOR APPELLEES.

The Brief, or "Assignment of Errors" filed in the cause by the Counsel for the Appellant, contains no statement of the case as required by Rule 21 of this Court.

The facts in the case, material for consideration, in determining the matters involved in the appeal, are briefly these.

On the 20th day of November 1876, Robert J. Glendy who then found himself insolvent, and Mary Jane his wife, executed a deed to Hugh W. Sheffey and James Bumgardner Jr, conveying several tracts or parcels of land situated in the Counties of Auugsta, Bath and Highland in the State of Virginia, and also "a certain tract or parcel of land in the "County of Greenbrier in the State of West Virginia, ad- "joining the lands of Bollar, McClung and others, contain-

" ing about twelve hundred acres, more or less, and known " as the Stuart McClung farm or tract," and granting certain specific articles of pesonal property, *In Trust*: First, That said grantees should make sales of said property upon terms as expressed in said deed. Second, That the sale notes and bonds should be made payable at the Augusta National Bank of Staunton and registered and deposited in said Bank for safe keeping and collection, and an account of such collecions, and of all disbursements thereof, to be kept at said bank which shall at all times be open to the inspection of any of the creditors of the said Robert J. Glendy. Third, That in order to ascertain the debts due to the creditors, respectively the said trustees may convene them, by publication, before a Master Commissioner, who shall state in each case how much is justly due, and from time to time shall state accounts of the funds collected and ascertain the dividends to which the creditors shall be entitled, and which shall be promptly paid out by the checks of said trustees on the fund in said Bank; and Fourth; after discharging the amounts due from said Robert J. Glendy on Judgments against him, and on vendors and other permanent liens now binding the lands conveyed by said deed, the trust fund shall be distributed ratably among the creditors of said Robert J. Glendy who may come forward and prove their debts before said Master Cmmissioner within ninety days after publication of notice requiring them so to do.

This Deed was recorded. in the Clerk's Office of the County Court of Greenbrier County, in the State of West Virginia, on the 21st day of November 1876 at 20 minutes to 11 o'clock A. M. See deed record pages 3, 4, 5, and 6.

On the 11th day of October 1875, the said Robert J. Glendy executed a deed to Alex. F. Matthews, conveying the tract of land situated in Greenbrier County West Virginia known as the Stuart McClung property which is described in, and conveyed by the deed of said Glendy to Hugh W. Sheffey and James Bumgardner Jr, in trust to secure the payment of two debts due to the Bank of Lewisburg, one for the principal sum of $10,000.00 and one for the sum of $5.000 which deed was delivered to the Clerk of the County Court of Greenbrier County to be recorded, on the 21st day

of November 1876 at 20 minutes to four o'clock P. M. and was copied upon the deed book in said Clerks Office, but was never *recorded*, for the reason that the deed was not authenticated so as to make it admissible to record, under the recordation Statutes of West Virginia. See deed record pages 7 and 8.

The delivering of the deed of Glendy to Matthews to the Clerk of the County Court of Greenbrier County being five hours later then the actual recordation of the deed of Glendy to Sheffy & Bumgardner.

In April 1877, Alex. F. Matthews, the Trustee named in the said last mentioned deed, advertised the Stuart McClung farm, situated in Greenbrier County, in order to the execution of the trust expressed in said deed; whereupon Hugh W. Sheffey and James Bumgardner Jr, on the 3rd day of May 1877, instituted their suit in the District Court of the United States for the District of West Virginia, against said Alex. F. Mathews, the Bank of Lewisburg and Robert J. Glendy, and filed their bill, alleging the execution of the deed of Glendy to the plaintiff and the legal recordation thereof, the execution of the deed to Alex. F. Matthews, that said Bank of Lewisburg had lodged in the Clerks Office of the County Court of Greenbrier the said deed of Glendy to Matthews *on the 21st day of November 1876 at 20 minutes to four o'clock P. M.* and in substance that the actual spreading of the Matthews deed on the record book did not effect the recordation of said deed, as the deed was not authenticated so as to make it admissible to record; alleging in substance that the tract of land situated in Greenbrier County West Virginia described in the deed to Matthews, as the "Stuart McClung property," was the identical tract of land conveyed in the deed of Glendy to Sheffey & Bumgardner, and therein described as a certain tract or parcel of land in the County of Greenbrier, in the State of West Virginia, adjoining the lands of Bollar, McClung and others, containing about twelve hundred acres and known as the "Stuart McClung farm or tract," and further alleging that said Matthews had advertised the Stuart McClung farm for sale fixing the 9th of May 1877 as the day of the sale, and prayed that the said Matthews be enjoined

from selling or otherwise proceeding under the deed to him, and prayed for general relief.

On the 3rd day of May 1877, the injunction prayed for in the Bill was awarded by order of the District Court.

On the 15th day of november 1877 the Bank of Lewisburg demurred to the Bill, and answered, alleging first, that Sheffey & Bumgardner Trustees, under the deed of Glendy to them, had notice of the deed previously executed but not recorded by Glendy to Matthews before the execution of the deed to them; Second, that Sheffey & Bumgardner had such notice before the recordation of the deed to them; Third, that by the terms of the deed to Sheffey & Bumgardner the debt due the Bank had priority, and Fourth, that the deed to Sheffey & Bumgardner was void on its face.

The answer was excepted to by the Plaintiffs, but on the 10th of Dec., 1877, the exeeption was waived, and a decree was entered directing by consent, that a sale of the Stuart McClung farm should be made by Hugh W. Sheffey, James Bumgardner, Jr., and Alex. F. Matthews jointly and be reported by them to the Court, and that the cause should be referred to a Master Commissioner to ascertain and report the creditors secured by the trust deed to Sheffey & Bumgardner and the sum due to each.

This sale was made and confirmed and the proceeds of sale placed in the custody of the Court, where they still remain.

At the May Term, 1878, of the District Court, the Bank of Lewisburg tendered for file, an amended and supplemental answer, stating that at the time that Glendy executed the deeds, he was not vested with the legal title to the Stuart McClung tract, situated in Greenbrier County, that since the filing of the original answer, the legal title had been conveyed to him, and that since the conveyance of the legal title the Bank had recovered judgment on the debts specified in the deed of trust to Matthews, and that thereby the Bank had acquired priority over the debts secured in the deed to Sheffey & Bumgardner.

The Plaintiffs objected to the filing of the amended and supplemental answer, and during that term and on the 4th day of May, 1878, the cause was heard upon its merits and a

decree was rendered by the Court which adjudicated every litigated question in the cause, and which was, as regards all questions of re-hearing or appeal, a final decree. That decree, in substance and effect, over-ruled the demurrer, refused leave to file the amended and supplemental answer, perpetuated the injunction awarded by former order entered in the cause, directed that the fund arising from the sale of the McClung farm, situated in the County of Greenbrier be brought into Court, to be by it distributed in accordance with the provisions of the deed of Glendy to Sheffey & Bumgardner.

At the August term of the Court, on the 2nd day of August, 1878, the Bank tendered a petition to re-hear so much of the decree rendered at the May term, 1878, as refused to allow the amended and supplemental answer to be filed. And at that term an order was entered postponing the consideration of the questions raised by petition to rehear.

At the November term, 1885, the Court entered a decree which was intended and purported to vacate the decree of May 4th, 1878, and on the 30th of November, 1887, the Court again heard the case upon all the matters involved in it, as the Record then stood, and decided and decreed,

1st. That the petition to re-hear should be rejected.

2nd. That the decree of November, 1878, should stand as unaffected by the subsequent decree directing it to be vacated, because said decree was final, and could not be opened or reviewed at a subsequent term.

3rd. Directing the register of the Court to turn over the fund in the cause to the Trustees Sheffey & Bumgardner to be disbursed by them to the creditors secured by the deed of Glendy to them, as ascertained by the report of the Master Commissioner filed and confirmed in the case.

Upon the entering of this decree, the Bank of Lewisburg appealed to this Court, (see opinion, Record, pages 53 to 61 inclusive.)

The matters involved in the cause for decision in the Court below were these:

1st. Did the Bill allege facts which entitled the plaintiffs to relief. This question was raised by the demurrer.

2nd. Did the deed of Trust executed by R. J. Glendy to Hugh W. Sheffey and James Bumgardner, Jr., have priority over the Deed of Trust executed by R. J. Glendy to Alex. F. Matthews.

3rd. Did the debts due from R. J. Glendy to the Bank of Lewisburg have priority over the General debts secured by the deed of R. J. Glendy to Hugh W. Sheffey and James Bumgardner, Jr., under and by reason of the provisions contained in that deed.

4th. Did the deed of R. J. Glendy to Alex. F. Matthews acquire priority over the deed of R. J. Glendy to Hugh W. Sheffey and James Bumgardner, Jr., or did the debt of the Bank of Lewisburg, specified in the Deed of Trust to Matthews, acquire priority over the general debts secured in the deed to Sheffey & Bumgardner by reason of the facts alleged in the amended and supplemental answer, tendered by the Bank and rejected by the Court. These questions were all decided by the Court below in the affirmative, and in favor of the plaintiffs, who are the appellees in this Court, and in so deciding we respectfully submit that the Court was plainly right.

ARGUMENT.

I.

The Court below was right in over-ruling the demurrer. The Bill alleges the conveyance by R. J. Glendy to the plaintiffs, of the "Stuart McClung farm," situated in Greenbrier County, West Virginia, and the proper and legal recordation of the deed of conveyance, in the office of the proper recording officer, to-wit: The Clerks Office of the County Court of Greenbrier County in the State of West Virginia, on the 21st day of November, 1876, at 20 minutes to 11 o'clock ante meridian of that day.

Further alleges the execution of the conveyance by R. J. Glendy to Alex. F. Matthews of the same "Stuart "McClung farm," which is described in and conveyed by the deed of Glendy to the Plaintiffs, and that said last named deed was not even attempted to be recorded, until the 21st day of November, 1876, *at 20 minutes to 4 o'clock, Post Meridian* of that day, but was never

in fact legally recorded, because it was not authenticated, so as to make it admissible to record, as required by the recording Statutes of West Virginia. The deed to Sheffey & Bumgardner, and the deed to Matthews from Glendy were exhibited with the Bill, and the facts contained in the deeds so exhibited are, under the rules of Equity pleading, alleged as perfectly as though distinctly repeated and expressed in the Bill. The Bill further alleges, that Hugh W. Sheffey and James Bumgardner, J., had no notice of the existence of the deed to Matthews until after said last named deed was spread on the Record Books in the Clerk's Office of the County Court of Greenbrier County at 20 minutes to 4 o'clock, P. M., on the 21st day of November, 1876, and in substance, that, according to the law of West Virginia, the title of Matthews under the deed to him, was subordinate to the title of the Plaintiffs, under the deed of Glendy to the Plaintiffs, and the liens securing the creditors provided for in the deed of Sheffey & Bumgardner, Jr., were prior and paramont to the lien securing the debt of the Bank of Lewisburg under the trust deed to Matthews. The Bill distinctly alledged that the deed to Mathews was void as a Trust Deed in West Virginia, because not authenticated for admission to record. The Statute law of W. Va. Code of West Va, Sec. 5, Chap. 74, (page 632) expressly declaring "Every such contract, every deed conveying any such es- "tate or term, and every deed of gift and deed of trust or "mortgage conveying real estate or goods and chattels, "shall be void as to creditors and subsequent purchasers "for valuable consideration, without notice, until and ex- "cept from the time that it is duly admitted to record in the "County Court wherein the property embraces in such con- "tract or deed may lie."

And lastly, alleged that A. F. Matthews had advertised the Stuart McClung farm for sale, having appointed as the day of sale, the 9th day of May, 1877, under and by virtue of the deed of Glendy to said Matthews.

The Bill on its face showed that the Plaintiffs were entitled under their deed from Glendy to sell the Stuart McClung farm in the due execution of the trusts expressed in said deed, and that Alex. F. Matthews *was not* entitled to

sell the Stuart McClung farm, as he was undertaking and attempting to do in execution of the trusts expressed in the deed of Glendy to him, which deed by express provision of the Statute law of West Virginia was void as to the plaintiffs, and their *cestuis que trust*, and the plaintiffs were therefore clearly entitled to file the Bill, asking that Matthews be enjoined from proceding to dispose of the trust subject, and asking the Court to pass upon the conflicting claim of the plaintiffs and Matthews in respect to this Stuart McClung farm, and to decree in accordance with its decision.

The Court properly, in effect, over-ruled the demurrer.

II.

Did the deed of trust executed by R. J. Glendy to Hugh W. Sheffey and James Bumgardner, Jr., have priority over the deed executed by R. J. Glendy to Alex. F. Matthews?

It is claimed that this question is affected in some way beneficial to the appellants, by the fact, that at the time of the execution of the deed of Glendy to the Plaintiffs, the legal title to the Stuart McClung farm, was not vested in Glendy. How or why that can be so, in view of the Statute law of West Virginia, as to the conveyance of real estate it is difficult to conceive. Sec 5 Chap. 71 (page 616), Code of West Virginia, declares "Any interest in or claim to Real " estate may be disposed of by deed or will." Sec. 7, Chap. 71, (page 616) Code of West Virginia deciares, "A writing " which purports to pass or assure a greater right or inter- " est in real estate, than the person making it may lawfully " pass or assure, shall operate as an alienation of such right " or interest in the said real estate as such person might " lawfully convey or assure."

Glendy's right to the Stuart McClung farm when the deed by him to Matthews was executed, were these: He had purchased it at a judicial sale. The sale to him had been confirmed by a decree of the Court, entered in the cause in which the sale was directed. He had fully paid the purchase money. He was in possession of the property. He was entitled as a matter of absolute right to a conveyance to be made by a ministerial officer of the Court under its order. And he was fully enabled by the provisions of Sec. 5, Chap.

71, Code of West Virginia, quoted above, to transfer all these rights to and vest them in another person. Such undoubtedly would have been the effect of the deed of Glendy to Matthews, except for the fact that the deed was locked up in the vaults of the Bank of Lewisburg, and never saw the light of day, until November 21st, 1876, at 20 minutes to 4 o'clock, P. M., of that day when it was taken to the Clerk of the County Court of Greenbrier County, and copied upon the deed book, but *not legally recorded*. And even if it had been at that moment actually recorded, still as to the grantees in the deed of Glendy to Sheffey & Bumgardner, and the creditors secured in that deed which was recorded at 20 minutes to 11 o'clock A. M., of that day, the deed to Matthews was *an absolute nullity*. Sec. 5, Chap. 74 of the Code of West Virginia, quoted at length above, in so many words directs, that every deed of trust shall be void, as to creditors and subsequent purchasers for valuable consideration, without notice, until and except from the time that it is duly admitted to record in the County wherein the property embraced in such deed may lie. Every circumstance stated in the Statute, as required to render the Matthews deed an absolute nullity, as to the grantees in the recorded deed to Sheffey & Bumgardner here concurred.

Hugh W. Sheffey and James Bumgardner, Jr., the grantees in the deed recorded on the 21st day of November, 1876, at 20 minutes to 11 o'clock, A. M., were subsequent purchasers for valuable consideration without notice. It is absolutely settled in West Virginia that a trustee in a deed of trust is a purchaser for valuable consideration.

In Wickham & Goshorn vs. Martin & Lewis, 13 Grat. 427, Judge Daniels, in his opinion and speaking for the Court says, (see page 437), "And I think it has been the "constant course of the Courts in the State to regard the "creditors in a deed of trust, made by their debtors, *bona* "*fide*, for their indemnity, in the light of purchasers for "value." The facts in that case called for a direct decision upon this point, and the Court so decided. That decision was in 1856, and it is perhaps entirely unnecessary to remark, that the decisions of the Court of Appeals of Virginia, made prior to the formation of the State of West Virginia, are as

binding in West Virginia, as the decisions of the Court of Appeals of West Virginia made since the formation of that State. The decision in the case of Wickham & Goshorn vs. Lewis Martin & Co., was approved in the case of Evans Trustee vs. Greenhow, 15 Grat. page 156, and Judge Moncure delivering the opinion of the Court quotes as the law of the subject the language of Judge Daniel quoted above, and further declares, that "a preexisting debt is, of itself, a val- " uable consideration for a deed of trust executed for its secu- " rity, which deed, if it be duly recorded, and was not exe- " cuted with a fraudulent intent, known to the trustees or " the beneficiaries therein, will be valid *against all prior secret* " *liens* and equities and all subsequent alienations and en- " cumbrances." Numerous cases, decided in Virginia, since the separation of West Virginia from Virginia, are to the same effect. The Courts of West Virginia have uniformily recognized and affirmed the doctrines stated in the cases of Wickham & Goshorn vs. Lewis & Martin, and Evans Trustee vs. Greenhow, and declared, that the trustees and beneficiaries in a deed of trust, executed to secure creditors, *are purchasers for valuable consideration*, 7 W. Va. 47, 8 W. Va. 441.

The recordation Statutes of Virginia and West Virginia, and the Statutes in those two States relating to the conveyance of real estate, are substantially identical. In both States, whenever the holder of a title or claim, required by the Statute to be recorded, does not record it, his title or claim, whatever it may be, is avoided in favor of the subsequent claimant, who has complied with the requirements of the recordation acts. As an illustration of this the case of Cammack vs. Soran, 30 Grat. 292, is referred to. And this doctrine is not now controverted in West Virginia or in Virginia.

A Federal Court, in passing upon questions involving rights to real estate in West Virginia, is governed by the laws of that State, as declared and expounded by its highest Courts. But this doctrine is neither new nor strange in the Federal Courts. This Court, 95 U. S., 16, has dedeclared, that "A Trustee named in a deed of trust is like a " Mortgagee or purchaser for value. Both occupy the same

" ground with respect to Notice actual and constructive."

Certainly then Sheffey & Bumgardner *were subsequent purchasers for valuable consideration*, whether so with or without notice, is to be determined from the evidence in the cause. In such a case notice is not presumed, but must be proven; proven by the party alleging it; and so proven as to convict the subsequent purchaser charged with it, of fraud.

The rule applicable to this case as to proof of notice is concisely laid down by Mr. Minor, (Minor's Institutes, Vol. 2, page 1040,) as follows: "We are next to advert to the " character of the notice (apart from such as may arise out " of the registry laws,) which will charge a subsequent pur- " chaser for valuable consideration, and exclude him from " the protection of the Statute. The effect of such notice, " it will be observed, is to attach to the subsequent purchas- " er the guilt of fraud. It is therefore never to be presumed, " but must be proved and proved clearly. *A mere suspicion* " *of notice even though it be a strong suspicion, will not suffice.*"

No attempt was ever made in the case to prove notice as to the existance of the deed of Glendy to Matthews as against the trustee James Bumgardner, Jr.

The only formal deposition taken in the case which bears at all on the question of notice is that of John M. Kinney, (Record pages, 41, 42 and 43) and that witness wholly fails to prove notice as to the trustee Hugh W. Sheffey. The appellant, in order to prove notice, as to the trustee Hugh W. Sheffey, called Sheffey himself as a witness, and for reasons satisfactory to the appellant, presumably because of the confidence of the appellant and his counsel in the high character of the witness, they voluntarily waived the usual safe guards of an oath, and a personal examination, and agreed that Judge Sheffey's written statement should be read in the cause instead of his deposition.

Ordinarily, a party calling a witness, presents him to the Court as worthy of credit, (Wharton Sec. 549) but the appellant in this case, by the manner in which he called Judge Sheffey to testify, introduced him to the Court as a witness worthy of the highest confidence. Judge Sheffey states distinctly that he had no notice of the deed of Glendy to

Matthews prior to the execution and delivery of the deed of Glendy to Sheffey & Bumgardner.

This statement is no where contradicted in the record, and there is no impeachment of Judge Sheffey's character and veracity, as in fact the appellant was precluded from impeaching or attempting to impeach the character or veracity of his own witness. So far then from proving notice to Judge Sheffey, the appellant by his own witness has clearly proved that there was no notice and the Court below found as here contended. See record, page 56.

It is of no avail to show notice after the execution and delivery of the deed of Glendy to Sheffey & Bumgardner- Upon the execution and delivery of the deed of Glendy to Sheffey & Bumgardner, the rights of the trustees as grantees of the property, and their duties as trustees for the benefit of the creditors secured, became fixed and absolute, "The subse- "quent purchaser, in order to be entitled to the protection "accorded by the Statutes must (1) be a complete purchaser, "who has paid the purchase money, and taken a convey- "ance before notice; and (2) without notice of the unrecor- "ded writing when he completes his purchase, as no other "requirement is demanded, it seems not to be needful that "the subsequent purchaser should have had his conveyance "recorded;" (Miner's Institutes Vol 2, p. 1040) not needful, as fixing the *status* of the subsequent grantee as a purchaser for valuable consideration without notice. Of course the subsequent grantee must obey the directions of the recording statutes, and submit to whatever penalty the recording statutes impose as a consequence of failure to record. Here the deed was immediately recorded, and the authority is cited to show that the subsequent grantee is not affected by knowledge or notice, received after the execution and delivery of the deed, and before the deed is actually recorded.

Then Hugh W. Sheffey and James Bumgardner, Jr., being subsequent purchasers for valuable consideration without notice, of the previously executed but unrecorded deed of Glendy to Matthews, which latter deed lay hidden in the vaults of the Bank of Lewisburg at the time when Glendy executed the deed to Sheffey & Bumgardner, the deed to Matthews was, as to said subsequent grantee, under the ex-

press declaration of the West Virginia Statute, utterly null and void, and Sheffey & Bumgardner took under this deed to them, whatever property that deed was operative to grant, as fully, as completely and as effectually as though the deed from Glendy to Matthews had never been executed. As regards Sheffey & Bumgardner Trustees, and as regards the beeficiaries in the deed to them, Matthews had no deed, and had no right, title or claim to the Stuart McClung Farm whatever; and the deed under which he claims was simply a piece of blank paper.

The deed of Glendy to Sheffey & Bumgardner purports to grant, in absolute fee simple the Stuart McClung farm. The deed conveys to Sheffey & Bumgardner that Stuart McClung farm as fully and as effectually as it was possible for Glendy, by any deed or form of conveyance to convey, pass or assure that property. It is true that at the date of conveyance, Glendy had not the technical legal title to the property. He had purchased it at a judicial sale. The sale to him had been confirmed by decree of the Court ordering the sale. His purchase money was fully paid. He was in possession of the property. His claim to ask the Court for a conveyance was absolute, and on such claim the Court was bound to direct the conveyance. By virtue of the provisions of Sec. 5, Chap. 71, and Sec. 7, Chap. 71 of the Code of West Virginia, Glendy was enabled to transfer by deed "all his interest in or claim to this property to a grantee, and whilst the deed to Sheffey & Bumgardner purports to pass a greater right or interest in the McClung farm, than Glendy then had, in that it purports to pass the legal title as well as the beneficial ownership of the property, still under Sec. 7 of Chap. 71 of the Code of West Virginia, the deed was operative to pass such right or interest as Glendy might lawfully convey or assure, and his deed therefore substituted Sheffey & Bumgardner to all his rights in, and claims to said property, and made them in trust for the creditors, the beneficial owners of the estate, and vested in them the right to claim of the Court under whose decrees the property had been sold to Glendy, a decree directing the conveyance to them, by the ministerial officer of the Court.

Such were the rights of Sheffey & Bumgardner, in re-

spect to the property in question, when this suit was instituted. As against their rights Matthews the Trustee, in the unrecorded deed, and the Bank of Lewisburg as creditor secured by the recorded deed, had nothing. Sheffey & Bumgardner were entitled to proceed to execute the trusts declared in their deed, and Matthews had no right to interfere with said Trustees in the execution of their trusts, had no right to the property, and no lawful power to sell the same, and the decree of the Court below perpetuating the injunction directing sale and distribution of the proceeds of the sale under the provisions of the deed to Sheffey & Bumgardner, and declaring in effect, that the deed to Sheffey & Bumgardner was prior and paramount to the deed to Matthews, was clearly right, and clearly in accordance with the just rights of the parties to the suit.

III.

Did the debt of Glendy to the Bank of Lewisburg have priority over the general debts secured in the deed to Sheffey & Bumgardner under and by reasons of the provisions of that deed?

In other words, treating the deed to Matthews as an utter nullity, is the debt to the Bank of Lewisburg so secured *by and in the deed to Sheffey & Bumgardner*, as to give it a priority over the other debts secured in said deed?

If the Bank debt is secured at all in the deed to Sheffey & Bumgardner, it can be so only by reason of the following clause in the deed, to-wit: "And upon the further trust "that after discharging the amounts due from said Robert J. "Glendy on judgments against him and on vendors and "other *paramount liens now binding said lands hereby* "*conveyed*, the trust fund shall be distributed ratably among "the creditors of said Robert J. Glendy who may come for-"ward and prove their debts," &c. The reasoning of the Judge of the Court below upon this point as expressed in his opinion incorporated in the last decree in the cause, (Record page 57,) seems so conclusive that we will simply refer to it and ask the Court to read it as expressing our views as to that matter.

IV.

Did the deed of Glendy to Matthews acquire priority over the deed of Glendy to Sheffey & Bumgardner, or did the debt due to the Bank of Lewisburg acquire priority over the general debts secured in the deed to Sheffey & Bumgardner by reason of the facts alleged in the supplemental and amended answer, tendered to the Court by the appellant, excepted to by the appellees, and rejected by the Court?

The allegations contained in the rejected, amended and supplemental answer are in substance these: That at the date of the deed to Matthews, and at the date of the deed to Sheffey & Bumgardner, Glendy the grantor in both deeds had not a complete legal title; the legal title, and simply the mere *technical legal* title being outstanding, to await simply the execution of a deed, by a Commissioner appointed by the Court to execute and deliver such a deed.

That a deed conveying the Stuart McClung property, was made by the Commissioner of the Court to Glendy on the 7th day of March, 1878, and recorded on the 27th day of March, 1878.

That after the said deed of the Commissioner of the Court to Glendy was recorded, and on the same day, the deed of Glendy to Matthews was proved and admitted to record in the Clerks Office of the County Court of Greenbrier, and (the deed to Matthews with the certificates thereon as to its record, is exhibited with said amended answer, and it may be stated here that the exhibit of said deed shows that it was never in fact recorded,) and on the 26th day of March, 1878, the Bank of Lewisburg recovered judgment against Glendy on the identical notes which evidence the debt attempted to be secured in the deed to Matthews.

It does not appear in said rejected answer by whom, or by what agency the deeds from the Commissioner of the Court to Glendy was procured and recorded.

The answer is entirely silent as to whether Glendy, acting by or for himself called upon the Commissioners of the Court and procured them to execute and deliver the deed, passing the naked legal title to him, or whether the same was done by the Bank of Lewisburg or by Matthews the Trus-

tee. It is not alleged in said rejected answer that these deeds were delivered to Glendy, and by him recorded, but simply that by these certain deeds, executed by the Commissioners, the lands aforesaid were conveyed to Glendy, and the deeds recorded. If, which may well consist with the truth of everything alleged in the rejected answer, these deeds were signed and sealed by the Commissioners and handed by them either to Matthews, Trustee, or to the Bank of Lewisburg, and passed thence into the hands of the recording officer, then the legal title did not pass by these deeds to Glendy, "for no person can be made a grantee against his will and without his agreement." Kent's Commentaries, Vol. IV, 454, and note 455. Preston on Abstracts 104. Thompson vs. Leach, Vent. 198, and the legal title is still outstanding in the Court which directed the sale of the land, and subject to the call of the party having the best right thereto, and if on the other hand, these deeds did pass the naked legal title to Glendy, it still remains in his heirs at law, and is subject to the call of the party having the best right to call for it. It is at all events a naked legal title wholly unconnected with any shadow of right to substantial ownership.

It will be observed that the title of Glendy when he executed the deed to Sheffey & Bumgardner, was precisely and in every respect, as it was when he executed the prior, but unrecorded deed to Matthews, if a mere equitable title in the one case, so it was in the other.

By the law of West Virginia, as already shown, a grantor may as well convey an equitable title as a legal one. If a grantor convey an equitable title, in a deed of trust which is not recorded, the Statute of West Virginia declares that title, void as to subsequent purchasers, for valuable consideration without notice. Glendy validly conveyed the equitable title to the Stuart McClung farm to Sheffey & Bumgardner, who in the light of the law, were subsequent purchasers for valuable consideration, without notice, and did record their deed, whereby the conveyance became effectual to pass to Sheffey & Bumgardner the equitable title, and the deed of Matthews became utterly void and passed to Matthews *nothing*.

How can the alleged change or transfer of the naked legal title, which change, as is conceded, brought that naked legal title no nearer to Matthews than it was before, beneficially effect Matthews as a grantee in a deed which, at the time of, and before the change in the location of the legal title, was an absolute nullity? Matthews was grantee in a deed which, had it been recorded, prior to the execution and recordation of a deed conveying the same property to a subsequent purchaser for valuable consideration without notice, would have vested in him the equitable title to the Stuart McClung farm. He did not so record his deed. There was a subsequent deed conveying the identical property to a purchaser for valuable consideration without notice, which deed was duly recorded. The Statute law of West Virginia declares the prior unrecorded deed void; and so permits Matthews to take nothing by the deed to him; and vests everything conveyed by the subsequent deed in Sheffey & Bumgardner. Afterwards the holder of the mere naked legal title conveys that naked legal title, and nothing else to a third party, to wit, to Glendy. By this subsequent conveyance nothing whatever, was even purported to be conveyed to Matthews, or to the Bank of Lewisburg. What can this last conveyance by the Commissioner to Glendy, to which neither Matthews nor the Bank of Lewisburg were parties, in which neither are named, possibly pass to Matthews, or to the Bank of Lewisburg? How can a deed from the Court Commissioner to Glendy, operative only to pass a mere naked legal title from the one to the other, operate to give validity, effect or priority, to the deed of Glendy to Matthews, which, prior to said deed passing the legal title, was subject to the Statutory condemnation of utter nullity?

This case is not one to be determined, in accordance of with the well understood maxim of equity jurisprudence, "*qui prior est in tempore, potior est in jure.*" It is not a case a mere comparison of equities, either in respect of time or potency; nor is it a case in which a party first holding an equity, and then acquiring the legal title the claims against the mere holder of an equity without the legal title.

The title conveyed by Glendy to Matthews was an equitable title. The title conveyed by Glendy to Sheffey &

Bumgardner was exactly the same equitable title to the same identical property. The mere legal title is outstanding as against both. The naked legal title, was transferred by the ministerial officer of the Court to Glendy, since the date of the deeds of Glendy to Matthews and Sheffey & Bumgardner, but the transfer leaves the legal title to stand as regards Matthews, and as regards Sheffey & Bumgardner, exactly as it stood before. The recording Statutes of West Virginia avoid deeds of trust conveying equitable titles, as absolutely as they avoid deeds of trust conveying legal titles, and the circumstances under which deeds of trust are so avoided are precisely the same in both instances.

The deed of Matthews being rendered absolutely null and void as against Sheffey & Bumgardner by reason of failure to record, and the deed to Sheffey & Bumgardner being operative to convey to them the equitable title, Sheffey & Bumgardner have the complete right, as incident to their equitable title, to call for the legal title and compel its conveyance to them. This matter was carefully considered in the ably decided case of Preston's Administrator vs Nash 75 Virginia 549, in which case it was decided, that where the legal title had been conveyed to a Trustee to secure the payment of debts, and the deed was not recorded, and the grantor subsequently sold the property to a third person, as evidenced simply by a contract in writing, who had fully paid the purchase money, but had not received a conveyance, and had no notice of the deed of trust, the claim of this purchaser, was entitled to priority over that of the creditor. That a party purchasing under a written contract who pays his purchase money in full, though he has not received a conveyance, is entitled to the protection of the recording acts as a *complete purchaser* and is entitled to call for the legal title, and to the same effect is the case of Lamar's Ex'r vs. Hale & als, 79 Va. 147.

The case of Briscoe vs. Ashby 24 Gratt. 454 is here referred to as showing how equitable titles, and the maxim *qui prior est in tempore potier est in jure*, is affected by the recording acts of Virginia, which are the same, in substance, as those of West Virginia, and is a case where the prior unrecorded equitable claim is protected against the subsequent

equitable claim, because, the prior claim was such a one, as the recording acts do not require to be recorded.

In this connection it is claimed by the appellants, that the execution of the deed of the Commissioners to Glendy, the recordation of that deed, and the subsequent recovery of the judgment of the Bank of Lewisburg vs. Glendy, operate, to give priority to the judgments, and for that reason the amended and supplemental answer should have been accepted and filed, and the priority of the Bank debt, as a judgment lien declared by the decree of the Court. We submit that the decision of the Court below on this point was correct. It is well established that a judgment lien is a general and not a specific lien. It is also well established that the owner and holder of an equitable estate is absolutely protected against a judgment recovered against the holder of the legal title. The holder of the mere legal title is the mere trustee for the party who is the beneficial owner of the estate. "The judgment lien creditor can acquire no better right to "the estate than the debtor himself has when the judgment "is recovered."

These principles have been time an again announced by the Courts of England, by this Court, and by the Court of Appeals of Virginia, as well prior to, as since the formation of the State of West Virginia. Withers vs. Carter, IV Gratt. 407; Brown vs. Pierce, 7 Wall. U. S. R. 205; Rogers vs. Bonner, 45 New York R. 379, Money vs. Dorsey, 7 Smedes & Marsh 15; Morton vs. Robards 4 Dana R. 258; and see specially the case of Floyd, Trustee, Vs. Harding & als, 28 Gratt. 401. It would seem, therefore, that it is too clear to need argument, that the rights of Sheffey & Bumgardner as Trustees, and the rights of the creditors secured by the deed to them, cannot be affected by the fact, that after the deed to Sheffey & Bumgardner was recorded, which deed passed a complete equitable title, and passed with that equitable title, the right to call in the legal title from whomsoever might hold it, the mere naked legal title was conveyed to Glendy, and subsequent thereto, a judgment was recovered against Glendy. But in addition, the effect of a judgment lien, in West Virginia is wholly statutory. Sec. 5, Chap. 139 Code of West Virginia, expressly provides,

that a lien of a judgment shall bind the estate which the judgment debtor is possessed of, or is entitled to; that is to say, that it binds the estate just as the debtor owns it or is entitled to it.

Then as the facts stated in the amended and supplemental answer, even if true, do not affect the questions to be decided in the cause, the Court below properly rejected the said answer,

If the Court below was right in rejecting the amended and supplemental answer tendered in the case, the Court was necessarily right on the merits, in rejecting the petition to rehear so much of the decree as refused to permit the defendants in the Court below, the appellants here, to file said amended answer. But for reasons independent of the merits, the Court had *no* right or power to grant the petition to rehear and review the case.

The decision of the Court refusing leave to file the amended and supplemental answer, was part of a final decree; of a decree perpetuating an injunction, directing the sale of trust property, and distributing the proceeds of sale, disposing of the merits of the controversy, leaving, as *ulterior* proceedings in the cause, such only as were mere modes of executing the original decree like the award of an execution at law. An appeal lay thereon to this Court.

Whitney vs. Banks United States, 73 Peters, 6.

Brenson vs. Railroad Company, 2 Black, 524.

Ray vs. Law, 3 Cranch, 179.

The petition to rehear was not filed or asked to be filed until the term subsequent to the term during which the final decree was rendered. It was then too late to ask a rehearing.

The 88 Rule of this Court for the Government of the Circuits Courts expressly declares that "No rehearing shall " be granted after the term at which the final decree of the " Court shall have been entered and recorded, if an appeal " lies to the Supreme Court." See also Sibbold vs. U. S. 12 Peters, 488; McMeeken vs. Pierce, 18 Howard, 507, Cameron vs. McRoberts 3 Wheaton, 591; Rolmer vs. Lemon 91 U. S. 149.

At the time when the preceeding portion of this Brief was written, the counsel for the appellant had only filed a paper, styled "Assignment of Errors," and had not filed a Brief, complying with the rule of the Court in that regard. The appellant has since filed a Brief, and appellee's counsel will add here such additional remarks, as may appear necessary by way of answer to said brief.

The first point discussed in the appellant's Brief, is: "*Was the decree of May 4th, 1878, fiual?*"

It is true that prior to the date of that decree, the property in question was directed to be sold by a *consent decree*. The intent and effect of that consent decree, was simply that the real estate which was the subject of the controversy should be sold, and that the proceeds of the sale should, thereafter for all the purposes of the suit, represent and stand in lieu of the real estate, and on the merits of the cause, as it stood when the decree of May 4th, 1878, was rendered, the simple matter to be determined by the Court was, whether Alex. F. Matthews as trustee for the beneficiary named in the deed to him, or Hugh W. Sheffey and James Bumgardner, Jr., as Trustees for the beneficiaries, entitled under the deed to them, was entitled to the property in question, or in other words, did the deed of Glendy to Sheffey & Bumgardner pass and transfer the Stuart McClung farm to Sheffey & Bumgardner as Trustees, or did the prior *unrecorded* deed to Matthews pass the Stuart McClung farm to Matthews as trustee.

Matthews claimed the subject of litigation as trustee, for the benefit of his *cestui que trust*. Sheffey & Bumgardner claimed the same subject, as trustees, for the benefit of their *cestuis que trust*.

The decree of May 4th, 1878, decides the cause upon its merits, declares that the property in question belongs to Sheffey & Bumgardner as Trutees; to be disposed of in accordance with the provisions of the deed of Glendy to them, " and all of the ulterior proceedings were but modes of executing the original decree," were simply to ascertain how the property which was decided to belong to Sheffey & Bumgardner as Trustees, should be distributed by said trustees to and among their *cestuis que trust?* This is not a case where

money is directed to be brought into Court, to be kept within the control of the Court until the rights of the parties concerned can be adjudicated by a final decree, but is a case where the rights of the parties litigant to the subject matter of the controversy, viz.: Sheffey & Bumgardner Turstees, of the one part and A. F. Matthews trustee of the other part, was absolutely determined by a decree. The decree in question is clearly a final decree under the rule stated in the case of Bostwick vs. Brinkerhoff, 106, U. S., quoted in the Brief of the Appellants.

Is the trust deed to Sheffey & Bumgardner void on its face? It is claimed in the appellant's brief, that said deed is void for two reasons: 1st. Because the deed neither mentions any creditor nor any specific debt; and 2nd. Because the deed postpons the sale of the trust property for six months.

In regard to the first point it will suffice to say, that the deed, held by the Supreme Court of West Virginia to be valid in the case hereinbefore quoted in this Brief, is in this regard precisely similar to the deed in question.

In regard to the second point, the Trust deed in question provides as follows: "Upon Trust, and with the hope "that business prosperity may be restored during the com-"ing year, and the property may sell for enough to pay all "of said Glendy's just debts; that such time during the "Summer of 1877, as said Hugh W. Sheffey and James "Bumgardner, Jr., Trustees, shall deem most conducive to "the interests of said creditors, they shall make sale of said "real estate and personal property on credits as follows, to-"wit:" &c. The deed in effect provides that the Trustees were to make sale as soon, as, in view of the general condition of the country, and the location of the property, a sale could be effected without ruinous sacrifice of the property. The provision for such delay in making sale does not effect the validity of a deed of Trust in W. Va.—upon this point the case of Lewis & als vs. Caperton's Exer. & als, 8 Grat. 148, is conclusive, and the authority of this case is as binding in West Virginia, as in Virginia.

Are the plaintiffs, Sheffey & Bumgardner, Trustees, as

grantees in the deed from Glendy to them, purchasers for valuable consideration?

It is conceded in the appellants Brief, that the deed of Glendy to Matthews if operative, could pass only on equitable title. It is apparent from the Record, that the deed of Glendy to Sheffey & Bumgardner, if operative, passes, the equitable title to the identical property specified in the deed of Glendy to Matthews.

The recording Statute of West Virginia declares that every deed of Trust shall be void or against creditors, and subsequent purchasers for valuable consideration, without notice until and except from the time it is duly admitted to record. This recording Statute avoids an unrecorded deed of trust, conveying an equitable estate, in favor of a subsequent purchaser for valuable consideration, without notice as completely, as it avoids an unrecorded deed of trust conveying a legal estate, in favor of such a subsequent purchaser.

The appellants' brief concedes that by and under the law of *West Virginia* a grantee in a deed of trust to secure creditors, is a purchaser for valuable consideration. Such was the law of Virginia, as uniformly declared by its highest Courts, at the time of the separation of West Virginia, from Virginia, and such is the law of West Virginia, as declared by its highest Courts, since its formation as a separate state; but the appellant's counsel in his Brief, asks the Court not to observe the law of West Virginia in this matter, but to rule in accordance with decisions in other states, and in accordance with decisions of this Court in other cases. As stated above in this Brief, this Court has in express terms declared, that "A Trustee named in a deed of trust is like a mortgage, a purchaser for value," (95, U. S. 16,) and we humbly submit, that this Court is passing upon rights to real estate situated in West Virginia, will follow the uniform decisions of the highest Court of that State, irrespective of the decisions of other States.

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